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EDITOR'S NOTE

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No. 86-243-AFX
Status: GRANTED

Title: City of Houston, Texas, Appellant
v.
Raymond Wayne Hill

Docketed:
August 12, 1986

Court: United States Court of Appeals
for the Fifth Circuit

Vide:
86-5678

Counsel for appellant: Martin III, Roy F.

Counsel for appellee: Maness, Michael A.

Entry	Date	Note	Proceedings and Orders
1	Aug 12 1986	G	Statement as to jurisdiction filed.
2	Aug 28 1986		Brief of appellee Raymond Wayne Hill in opposition filed.
3	Aug 28 1986	G	Motion of appellee for leave to proceed in forma pauperis filed.
4	Sep 3 1986		DISTRIBUTED. September 29, 1986
5	Sep 25 1986		Record filed.
6	Sep 25 1986		Certified copy of original record on appeal and C. A. proceedings received.
8	Oct 6 1986		Motion of appellee for leave to proceed in forma pauperis GRANTED. Justice Scalia OUT.
9	Oct 6 1986		PROBABLE JURISDICTION NOTED. Justice Scalia OUT.
			**********
11	Nov 8 1986		Order extending time to file brief of appellant on the merits until December 2, 1986.
12	Nov 20 1986		Joint appendix filed.
13	Dec 2 1986		Brief of appellant Houston, Texas filed.
14	Jan 2 1987		Brief amicus curiae of ACLU, et al. filed.
15	Jan 5 1987		Brief of appellee Raymond Wayne Hill filed.
16	Feb 6 1987		CIRCULATED.
17	Feb 6 1987		SET FOR ARGUMENT. Monday, March 23, 1987. (4th case)
18	Feb 13 1987	D	Motion of National Institute of Municipal Law Officers for leave to file a brief as amicus curiae, out-of-time, filed.
19	Feb 23 1987		Motion of National Institute of Municipal Law Officers for leave to file a brief as amicus curiae, out-of-time, DENIED.
20	Mar 16 1987	X	Reply brief of appellant Houston, Texas filed.
21	Mar 23 1987		ARGUED.

JURISDICTIONAL

STATEMENT

86-243

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Should a federal court invalidate a municipal ordinance on the basis of facial overbreadth when a limiting construction could be placed on that ordinance?

   A. Can a limiting construction be placed on the municipal ordinance?

   B. Does Texas law prohibit a limiting construction from being placed on the municipal ordinance?

II. Should the federal courts abstain from deciding constitutional challenges to a municipal ordinance when the state courts have not had an opportunity to interpret that ordinance?

III. Did the court below err in assuming a fact-finding role in analyzing the trial court evidence, and did this lead to an erroneous opinion?

PARTIES

Appellant: The City of Houston, Texas

Appellee: Raymond Wayne Hill

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit *en banc* is reported at 789 F.2d 1103 (1986), and is reproduced as Appendix A. The Findings of Fact and Conclusions of Law of the United States District Court, Southern District of Texas is reproduced as Appendix B.

JURISDICTION

This appeal is taken from a judgment of the Court of Appeals for the Fifth Circuit *en banc* which invalidated, *in toto*, a City of Houston Ordinance on the ground that the ordinance was "substantially overbroad", and therefore facially unconstitutional. The Court of Appeals *en banc*, 8-7 decision, reversed the District Court for the Southern District of Texas, which had held the ordinance constitutional.

Jurisdiction of the district court was conferred by 28 U.S.C. § 1331, and jurisdiction of the Court of Appeals was conferred by 28 U.S.C. § 1331 and 28 U.S.C. § 1291.

The Court of Appeals *en banc* judgment was entered May 14, 1986 and is attached as Appendix C. A Notice of Appeal was filed in that Court on July 25, 1986 and is attached as Appendix D.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

First Amendment of the United States Constitution.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment, § 1 of the United States Constitution.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Code of Ordinances of the City of Houston (1968) § 34-11(a) (recodified Ordinance No. 85-1380)

> "§ 34.11. *Assaulting or interfering with policemen.*
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."

STATEMENT OF THE CASE

A. The City of Houston Ordinance

The City of Houston codified its Code of Ordinances in 1968. That Code contained § 34-11(a) which made it a Class C misdemeanor for:

> "Any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."

Though not contained in the 1985 recodification, the former § 34-11(a) was "saved" by virtue of Ordinance No. 85-1380 passed on August 21, 1985.

On February 14, 1982, Raymond Wayne Hill was arrested for violating the ordinance after confronting two

police officers on a Houston street. This incident marked his third arrest under the ordinance. Mr. Hill was tried in municipal court but found "not guilty". Subsequently, he instituted this litigation in federal district court seeking relief under 42 U.S.C. § 1983, et seq. Specifically, he sought declaratory and injunctive relief and damages asserting that the ordinance was unconstitutional as applied and/or facially unconstitutional as either vague or overbroad.

B. Actions By The Courts Below

At trial, the district court sitting without a jury, held that the ordinance had been constitutionally applied in this case, and further was neither unconstitutionally vague nor overbroad, and therefore denied all relief. A copy of the district court's Findings of Fact and Conclusions of Law is attached as Appendix B.

On appeal, a divided panel reversed the district court with regard to the facial overbreadth challenge and held the ordinance unconstitutional.

The City of Houston filed a Suggestion for Rehearing *en banc* which was granted. After briefs and oral argument the majority (8-7) concluded that the ordinance was facially overbroad, and therefore unconstitutional. On the other issues, the *en banc* Court did not contradict the district court's finding that the ordinance had been constitutionally applied, and because of the outcome of the overbreadth challenge, the Court below did not address the facial vagueness question.

The only constitutional challenge presented on appeal to this Court is the facial overbreadth of the ordinance.

C. Record Identification Of The Question Presented

The overbreadth question presented in this appeal was first raised in the Original Complaint filed in the District Court by appellee herein, Raymond Wayne Hill. On appeal to the Fifth Circuit the brief of the aforementioned appellee raised the question at page 2, under the heading "Statement of the Issue." The Court of Appeals in a 2-1 decision reversed the district court. On rehearing *en banc* the supplemental brief for appellant, the City of Houston, raised the issue of overbreadth at page 9 under the heading "Argument."

The abstention question presented in this appeal was first raised in the City of Houston's Suggestion for Rehearing *en banc* filed with the Fifth Circuit. The issue was not raised to the appellate court panel because the District Court had held the statute constitutional and it was the appellee herein, Raymond Wayne Hill, who had prosecuted the appeal and brought forth the points of error.

THE FEDERAL QUESTION IS SUBSTANTIAL

The federal question is substantial and merits the noting of probable jurisdiction for three reasons. First, the decision of the Court of Appeals for the Fifth Circuit *en banc* is in conflict with earlier decisions of this Court, most recently, *Brockett v. Spokane Arcades, Inc.*, ____U.S.____, 105 S. Ct. 2794, 86 L.Ed.2d 394 (1985). The opinion below is in conflict because it sustained a facial constitutionality challenge and thereby clashed with this Court's long-standing reluctance to make blanket constitutional pronouncements. The issue of whether the court's decision was necessary or proper is paramount

and implicates the fundamental rule recognized by this Court that courts should never anticipate a question of constitutional law in absence of the necessity of deciding it, and never formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. The court below erred by not adhering to this cardinal rule. In light of *Brockett*, the confusion arising from this conflict would be greatly compounded, not diminished, by a summary affirmance of the Court of Appeals in this case.

Second, a fundamental question of federalism is involved, *i.e.*, the respective roles of federal and state courts in deciding constitutional challenges to validly enacted local laws. Simply put, this case poses the question of whether the state courts should be permitted to initially interpret local laws, or whether the federal courts should intervene and preempt a state court from an opportunity to impose a constitutionally permissible interpretation on the law.

Third, a question arises of the respective roles of the federal appellate courts vis-à-vis the federal district courts with regard to the task of fact-finding. This question is also substantial because the eagerness of the majority below to find facts not established at trial and not challenged on appeal in support of its position formed an incorrect premise which contributed to an erroneous opinion.

We briefly take up these three points.

I. A Federal Court Should Not Invalidate A Municipal Ordinance On The Basis Of Facial Overbreadth When The Ordinance May Be Judicially Limited.

The ordinance at issue in this case is § 34-11(a) of the Code of Ordinance of the City of Houston (recodified by Ordinance 85-1380, August 21, 1985) which provides:

> Sec. 34-11. *Assaulting or interfering with policemen.*
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making his arrest.

On its face the ordinance can be applied to a wide variety of activities, some of which concededly cannot constitutionally be punished. However, just because this ordinance may apply hypothetically to some protected conduct, does not mean that a constitutional challenge for facial overbreadth must succeed. *See e.g. Brockett*, 105 S. Ct. 2794, at 2801. In fact, decisions of this Court indicate that successful facial challenges even when a statute has potential unconstitutional applications are a rare exception rather than the rule.

The leading case on this issue is *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973). In that case, this Court held that the "application of the overbreadth doctrine is, manifestly, strong medicine. It has been employed sparingly and only as a last resort." 413 U.S. at 613. Furthermore, and more importantly the Court added, "facial overbreadth has not been invoked when a limiting construction *has been* or

could be placed on the challenged statute." *Id.* at 613 (emphasis added). Using this guideline, the Court held that the statute in question was not facially overbroad, and whatever overbreadth existed should be cured on a case-by-case basis.[1] *id.* at 615. Simply put, facial challenges will not be sustained if there is an alternative manner in which to interpret the ordinance in issue.

This doctrine of restrained constitutional adjudication has been reflected in other decisions of this Court.

In *Cantwell v. State of Connecticut*, 310 U.S. 296, 60 S. Ct. 900 (1940), the Court did not facially invalidate a state "breach of the peace" offense, even though it was analogous to a "statute sweeping in a great variety of conduct under a general and indefinite characterization,

1. The statute in question was Okla. Stat. Ann., Tit. 74, § 818 (6),(7). The two subsections provide:

> (6) No employee in the classified service, and no member of the Personnel Board shall, directly or indirectly, solicit, receive, or in any manner be concerned in soliciting or receiving any assessment, subscription or contribution for any political organization, candidacy or other political purpose; and no state officer or state employee in the unclassified service shall solicit or receive any such assessment, subscription or classified service.
>
> (7) No employee in the classified service shall be a member of any national, state or local committee of a political party, or an officer or member of a committee of a partisan political club, or a candidate for nomination or election to any paid public office, or shall take part in the management or affairs of any political party or in any political campaign, except to exercise his right as a citizen privately to express his opinion and to cast his vote.

The Court acknowledged that the statute may have some overbreadth, 413 U.S. at 615, but at the same time also regulates a substantial spectrum of conduct that is as manifestly subject to state regulation as the public peace . . ." *Id.* at 616. The Court added that there comes a point where a prediction of unconstitutional application cannot justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. *Id.* at 615.

and leaving to the executive branch too wide a discretion in its application".[2] 310 U.S. at 308. Instead the Court invalidated the statute only to the extent that it had been applied to protected conduct.

More recently in *United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L.Ed.2d 736 (1983), the Court declined to facially invalidate a federal statute[3] prohibiting demonstrations on the premises of the Supreme Court building even though the statute on its face also could be construed to apply to constitutionally protected conduct at protected locations. The Court instead held that the statute could not be applied to certain locations but that otherwise a facial challenge was improper.

Finally in *Brockett v. Spokane Arcades, Inc.*, ____U.S. ____, 105 S. Ct. 2794, the Court refused to facially invalidate a state obscenity statute,[4] despite a belief that

2. This characterization is very similar to that given to the Houston ordinance by the opinion below, wherein the court said: "the ordinance sets a net large enough to catch all possible offenders, improperly leaving it to the courts to step inside and say who could be rightfully detained, and who should be set at large. The ordinance places virtually unfettered discretion in the hands of the Houston Police." *Hill*, 789 F.2d at 1110-11.

Yet this characterization was insufficient to sustain a facial attack in *Cantwell*.

3. 40 U.S.C. § 13k provides:

> "It shall be unlawful to parade, stand, or move in procession or assemblages in the Supreme Court Buildings or grounds, or to display therein any flag, banner or device designed or adapted to bring into public notice any party, organization, or movement."

The Court noted that this statute, by its terms, applied to areas which Congress could not constitutionally control, 103 S. Ct. at 1708, 1710.

4. Wash. Rev. Code § 7.48A.010-7.48A.900 (1983) which provided civil and criminal penalties for those who dealt in obscenity. The statute declared to be a "moral nuisance" any place where "lewd" materials are exhibited. "Lewd" was defined to be synonomous

the statute hypothetically could be applied to constitutionally protected activity. 105 S. Ct. at 2800-01. The Court held that despite the possible overbroad application, facial invalidation was improvident, and the statute would be unconstitutional only as applied to protected conduct. *See also Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 276, 90 L.Ed.2d 265 (1946); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L.Ed.2d 405 (1963).

In the case at bar, the court below erred because it held the municipal ordinance facially overbroad. This was error because it did not comport with this Court's limitations upon making sweeping constitutional statements as outlined above. This error is accentuated because the cases cited by the majority below are distinguishable and do not support their finding facial overbreadth on the facts of this case.

For instance, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975) was cited by the majority in support of the concept that facial invalidity is proper. *Hill*, 789 F.2d at 1112. However, that case is factually distinguishable from the case at bar. In *Erznoznik*, the state appellate courts including the state supreme court had upheld convictions under an

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with "obscene" which is defined among other ways as material which appeals to the prurient interest. § 7.48A.020(2)(a).

The word "prurient" is defined to mean "that which incites . . . lust." § 7.48A.010.(8).

The constitutionality of this statute was challenged on the grounds that use of the word "lust" in defining the term "obscene" rendered the statute facially overbroad, because the word "lust" which covered material that could be proscribed also described material which obviously was constitutionally protected. Nevertheless the Court held that the statute was susceptible of a limiting construction, and given the chance the state courts would constitutionally limit it, therefore facial invalidity was improvident. 105 S. Ct. at 2802.

"obscenity" ordinance and had not judicially limited the definition of the statute instead holding that the ordinance was legal and did not need any limitation. This Court held that on those facts the statute obviously was not susceptible of a narrowing construction by the state courts because the state courts had shown that they would not narrow the statute's scope. Indeed, when the state courts were presented with this overbreadth challenge they had made no effort to restrict its application.

On the other hand, in the case at bar, the Texas courts have not had the opportunity to possibly restrict the ordinance's application, and therefore when presented with a case would have the authority to so restrict. Unlike the situation in *Erznoznik*, the Texas appellate courts are not bound by existing Texas Supreme Court precedent in construing the ordinance. In *Erznoznik*, this Court acted as a last resort because the state courts had exhausted their possible construction of the law and had failed to act. Whereas in this case, the state courts have not exhausted their possible review, and therefore this Court does not need to act as a Court of last resort.

Furthermore, the majority below recognizes that the ordinance on its face also applies to constitutionally proscribable conduct, and since the state courts may yet limit the ordinance's application to proscribable conduct, reliance upon *Erznoznik*, where the limiting procedure was exhausted, is improper. For the same reason, reliance on *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L.Ed.2d 786 (1984) and *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L.Ed.2d 772 (1984), "where the statutes at issue had no possible constitutional application," is improper. *See Brockett*, 105 S. Ct. at 2802.

A. The Municipal Ordinance Is Susceptible Of A Limiting Construction.

The ordinance at issue in this case, while hypothetically applicable to protected conduct, also includes within its sweep that conduct which constitutionally may be proscribed. Therefore, the ordinance unlike those in *Munson*, 467 U.S. 947; and *Taxpayers for Vincent*, 466 U.S. 789, is, provided one can be found, at least a candidate for a limiting construction.

In devising a limiting construction the Texas trial or appellate courts could determine that the ordinance requires "intent" or that the ordinance cannot apply to certain types of conduct. These constructions are not prohibited by the terms of the ordinance.

For example, one source that the courts could utilize in placing a limiting construction on the ordinance is § 6.02 of the Texas Penal Code which provides in relevant part:

> "(a) Except as provided in Subsection (b) of this section, a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.
>
> (b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
>
> (c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility.

Section 6.02 provides statutory guidance to the courts to apply an intent requirement.

B. Texas Law Does Not Preclude A Limiting Construction From Being Placed On The Ordinance.

Violations of the ordinance are punishable as Class "C" misdemeanors. The trial is conducted in a municipal court. In 1976 these courts were officially made courts of record, and a defendant thereafter has a right to an appeal in the county criminal courts. TEX GOV'T. CODE ANN. § 30.269(a) (Vernon Supp. 1986). If his fine exceeds $100.00 he also has the right to appeal to a state court of appeals. Tex. Gov't Code Ann. § 30.278 (Vernon Supp. 1986). In addition, at any time he has the right to bring a § 1983 action in state courts to seek a determination of the ordinance's meaning. *Martinez v. State of California*, 444 U.S. 277, 100 S. Ct. 553, 62 L.Ed.2d 481 (1980); *Testa v. Katt*, 330 U.S. 386, 67 S. Ct. 810, 91 L.Ed. 967 (1947). Despite this state review process, the state courts have not had an opportunity to rule on the constitutional merits of this ordinance. The merits simply have never been presented on appeal. While the majority below cites *Erznoznik*, and asserts that this failure to review is sufficient reason for the federal courts to intervene, the important point is that there is no precedent established which prevents a state court from constitutionally limiting this ordinance and therefore Texas law does not preclude such a limiting construction.

II. A Federal Court Should Abstain From Deciding Constitutional Challenges To A Municipal Ordinance When The State Courts Have Not Had An Opportunity To Previously Interpret The Ordinance.

This Court has said that "the paradigm of the "special circumstances" that make abstention appropriate is a case where the challenged [ordinance] is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a constitutional question." *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 99 S. Ct. 2301, 60 L.Ed.2d 895 (1979).

In announcing the abstention doctrine in *Railroad Commission of Texas v. Pullman,* 312 U.S. 496, 61 S. Ct. 643 (1941), this Court in effect developed a two part test:

1) There must be an issue of unsettled state law; and
2) There must be a possibility that the state law determination will moot or present in a different posture the federal constitutional question raised.

The policies of federalism and comity require that state courts be given the initial opportunity to interpret local laws. As was pointed out in *Brockett,* 105 S. Ct. 2794, where uncertain question of state law exist, federal courts should abstain entirely until a state court has addressed the state question. *Id.* at 2804 (O'Connor, J., concurring).

In the case at bar, abstention may be a particularly appropriate remedy. This is so because if the ordinance is susceptible of a limiting construction then a declaration

of facial invalidity is inappropriate. *Broadrick,* 413 U.S. at 613, and the Court would, at most, have to declare the statute unconstitutional as applied to a particular fact situation. *See United States v. Grace,* 461 U.S. 171. Yet, the courts below have unanimously held, without challenge, that the ordinance was constitutionally applied in this case. As a result, this Court will only be able to hypothesize the scope of the ordinance. In this regard, the Court does not have a concrete case before it which sharply presents the issues, and runs the risk of simply guessing at the ordinance's meaning. For this reason, the significant question of abstention merits consideration by this Court.

III. The Court Below Erred In Assuming A Fact-Finding Role And In Finding Facts Contrary To Those Found By The Trial Court.

In analyzing the merits of this case regarding the issue of "substantial overbreadth", the court below reviewed the record of the trial proceedings. Part of the record consisted of evidence regarding conduct which had been characterized by the police as violations of the ordinance at issue. Instead of adopting the trial court's findings which were unchallenged on appeal, the court below made its own findings from the evidence.

In reviewing the evidence, the court below determined that the list "[is] instructive because it provides examples of the kinds of activity that the city characterizes as offenses under the ordinances." *Hill,* 789 F.2d at 1109. The Court went further to state that the offender *"in many instances"* did nothing more than "speaking" or "failing to remain silent". *Id.* at 1109 (emphasis added). From this the court below concluded that the City

apparently sees no problem in characterizing "talking" and "arguing" as offenses under the ordinance. *Id.* at 1109.

The result of this factual review is that the court below without the benefit of live testimony, but solely on the basis of a record and "*evidence*" offered at trial, determined that there are many instances of unconstitutional application of this ordinance. The obvious insinuation is that this ordinance primarily is used in an unconstitutional manner which, in turn, supported their opinion that the ordinance is substantially overbroad, incapable of a limiting construction, and therefore facially unconstitutional. Instead, the unchallenged factual finding was that this ordinance has *never* been unconstitutionally applied.

This conduct by the court below was error because the court assumed duties for which it does not have authority. In reality, the trial court, after hearing live testimony and reviewing the evidence, held that there was no instance in which the challenged ordinance was used to make improper or illegal arrests. This factual finding was unchallenged on appeal, and therefore must be taken as true.

The court's actions in changing unchallenged findings of fact constitute an important issue with regard to its majority opinion and merits consideration by this Court.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted, and the decision of the Court of Appeals *en banc* reversed.

Dated this 12th day of August, 1986.

Respectfully submitted,

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August, 1986

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Raymond Wayne HILL,
Plaintiff-Appellant,

v.

The CITY OF HOUSTON, TEXAS,
Defendant-Appellee.

No. 84-2181.

United States Court of Appeals,
Fifth Circuit.

May 14, 1986.

A civil rights action was brought challenging the constitutionality of an ordinance which made it illegal to, in any manner oppose, molest, abuse or interrupt a police officer in the execution of his duty. The United States District Court for the Southern District of Texas, James DeAnda, J., upheld the constitutionality of the ordinance, and appeal was taken. The Court of Appeals, 764 F.2d 1156, reversed and remanded. On rehearing en banc, the Court of Appeals, Alvin B. Rubin, Circuit Judge, held that the ordinance was unconstitutionally overbroad.

Reversed and remanded.

Patrick E. Higginbotham, Circuit Judge, filed a dissenting opinion in which Clark, Chief Judge, Gee, Garwood, E. Grady Jolly, W. Eugene Davis, and Edith Hollan Jones, Circuit Judges joined.

Michael A. Maness, Houston, Tex., for plaintiff-appellant.

Bruce V. Griffiths, Houston, Tex., James C. Harrington, Austin, Tex., for Greater Houston, etc. et al.

Mark Elvig, Asst. City Atty., Roy F. Martin, III, Senior Asst. City Atty., Houston, Tex., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, THORNBERRY, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.*

ALVIN B. RUBIN, Circuit Judge:

A Houston, Texas ordinance makes it a misdemeanor not only to assault but also to "in any manner oppose, molest, abuse or interrupt" a police officer in the execution of his duty. An individual who has been arrested several times for violating the ordinance, and who has never been found guilty, challenges its constitutionality as violating his right to freedom of speech. We hold that the plaintiff has standing to challenge the constitutionality of the ordinance, and that the ordinance in its present form is facially and substantially overbroad and, therefore, unconstitutional. We reverse the judgment of the district court insofar as it upheld the constitutionality of the ordinance and remand for the award of appropriate relief to the plaintiff. Based on the district court's findings of fact, we reject all the rest of his claims.

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* Judge Tate did not participate in the decision of this case.

I.

Section 34-11(a) of the Code of Ordinances of the City of Houston, Texas, provides:

> Sec. 34-11. *Assaulting or interfering with policemen.*
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

Violation of the Ordinance is a Class C misdemeanor, punishable upon conviction in the Municipal Court of the City of Houston by a fine not to exceed $200.00

While Houston Police Department officers J. L. Kelley and R. D. Holtsclaw were making a traffic arrest at the intersection of Westheimer and Whitney streets in Houston, they noticed Charles Hill, who is unrelated to the plaintiff, directing traffic and stopping vehicles, including a city bus, in a heavily travelled lane of traffic on Westheimer. Officer Kelley approached Charles Hill and began speaking with him about his behavior. The testimony about what happened next is conflicting. Raymond Hill testified that, after a short conversation between Officer Kelley and Charles, Charles attempted to leave, but Officer Kelley grabbed him by the shoulder and began yelling at him. Raymond further testified that, after Officer Kelley permitted Charles to leave, Kelley chased him, and, upon catching him and being joined by his partner, challenged Charles to fight.

Officer Kelley testified that Charles's actions were "extremely erratic. . . . He was twitching all of the time. . . . I didn't know if he was about to have a seizure or if

he was being insolent or what." Before Kelley could determine the cause of Charles Hill's behavior, Charles began walking away. Kelley tried to stop him but Charles continued walking so Kelley took him by the arm and stopped him. The district court rejected Raymond's testimony, and found that "Officer Kelley approached Charles Hill and began speaking with him." This finding is fully supported by the record.[1]

By this time a crowd had gathered. Raymond, who was standing in front of the crowd, about seven or eight yards from them, yelled to the policemen, in an admitted attempt to divert their attention from Charles, "Leave him alone. Why don't you pick on somebody your own size?" or words to that effect. Raymond's statements were unaccompanied by any menacing or threatening gesture, although Officer Kelley characterized the tone of his speech as "loud" and "boisterous." Kelley testified that he interpreted Raymond's remarks as somewhat threatening because of their tone, but there is no evidence to support the district court's finding that Raymond "shout[ed] abuses" at Officer Kelley.

According to Officer Kelley's testimony, after Raymond yelled to him, Kelley turned towards Raymond and asked, "Are you interrupting me in my official capacity as a Houston police officer?" He testified that Raymond who was standing with a crowd of people behind him, put his hands on his hips and replied, "Yes. Why don't you pick on somebody my size?" Officer Kelley then arrested Raymond and charged him with violating the ordinance. After a trial in municipal court, Raymond was

1. *See United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L.Ed. 746, 765 (1948); *Williams v Reading & Bates Drilling Co.*, 750 F.2d 487, 489 (5th Cir. 1985).

found not guilty for reasons that have not been preserved in a record.

Raymond Hill's arrest was neither his first encounter with the criminal law nor the first time he had been charged with violating the ordinance. At the time, he was forty-one years old and a resident of Houston, Texas. After serving five years in the state penitentiary for burglarly convictions, Hill had returned to Houston in 1975 and helped form the Houston Gay Political Caucus. He has since been a vocal advocate of the homosexual cause and was on the Caucus' Board of Directors at the time of trial. In addition to employment as a paralegal, he also did radio shows for a local community service broadcasting station and, accordingly, carried a press badge.

Twice before and once after his February 14, 1982 arrest, Hill was charged with violating the challenged ordinance, although he has never been convicted. Hill testified that he made a practice of deliberately confronting policemen engaged in making arrests. He was disturbed by what he perceived to be police harassment of homosexuals, and he testified that he would prefer to be arrested himself rather than see the arrest of persons whose careers might be damaged. He added, "I am prepared to respond in any legal, nonaggressive or nonviolent way, to any illegal police activity, at any time, under any circumstances."

Hill filed this suit, under 42 U.S.C. § 1983, claiming that his arrest was illegal and seeking money damages from the city of Houston and the arresting officers; he also sought expungement of his arrest record, injunctive and declaratory relief, and attorney's fees. He contended that he was arrested for exercising his right of free speech.

He also contended that, regardless of the particulars of his own arrest, enforcement of the ordinance should be enjoined or the ordinance declared invalid because it is unconstitutionally vague and because its potential for application to protected speech renders it unconstitutionally overbroad. Before trial and by agreement, all claims against the two officers were dismissed and the City withdrew its jury demand. After a bench trial, the district judge rejected the constitutional attacks, upheld the arrest, and entered a judgment for the City. On appeal, a divided panel of our court voted to reverse and remand.[2] The panel majority did not decide whether the ordinance was unconstitutionally vague or whether, as applied, it denied Hill's right of free speech. We took the case en banc and now review the judgment of the district court.

II.

Article III of the Constitution establishes a jurisdictional threshold to be crossed by any citizen who would challenge the constitutionality of a statute. An actual case or controversy must be alleged. "Standing" is one element of the "case or controversy" limitation on federal court jurisdiction, and focuses primarily "on the party seeking to get his complaint before a federal court."[3] "The gist of the question of standing" as the Supreme Court said in *Baker v. Carr*, is whether the plaintiff has alleged "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for the illumination of difficult constitutional ques-

2. 764 F.2d 1156 (5th Cir. 1985).

3. *Flast v. Cohen*, 392 U.S. 83, 99, 88 S. Ct. 1942, 1952, 20 L.Ed.2d 947, 961 (1968).

tions."[4] The district court found that Hill had "not succeeded in raising any valid First Amendment claims," and, on this basis, denied him standing to pursue his claim.

The usual standing rule is clear: "[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional."[5] When the challenge is based on the first amendment, however, different considerations apply. As explained by the Supreme Court:

> Even where a First Amendment challenge could be brought by one actually engaged in protected activity, there is a possibility that, rather than risk punishment for his conduct in challenging the statute, he will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, where there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society's interest in having the statute challenged. "Litigants, therefore, are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial predication or assumption that the statute's very

4. *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L.Ed.2d 663, 677 (1962); *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922, 927-28 (5th Cir. 1983), *aff'd*, 465 U.S. 1092, 104 S. Ct. 1580, 80 L.Ed.2d 114 (1984).

5. *United States v. Raines*, 362 U.S. 17, 21, 80 S. Ct. 519, 522, 4 L.Ed.2d 524, 529 (1960); *see also Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343, 354 (1975); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 759-60, 70 L.Ed.2d 700, 710-11 (1982).

existence may cause others not before the court to refrain from protected speech or expression."[6]

Hence, courts have allowed plaintiffs in suits for declaratory or injunctive relief to raise first amendment challenges to statutes because of their alleged overbreadth or vagueness.[7]

[1] Hill clearly had sufficient standing to question the facial validity of the ordinance. Hill's record of arrests under the ordinance and his adopted role as citizen provocateur made his article III standing to seek injunctive and declaratory relief certain.[8]

III.

[2] The language of the ordinance is not enigmatic. Read on its face, the conduct proscribed includes oppos-

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6. *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, _____, 104 S. Ct. 2839, 2847, 81 L.Ed.2d 786, 795 (1984) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2916, 37 L.Ed.2d 830, 839 (1973)); *see also Gooding v. Wilson*, 405 U.S. 518, 520-21, 92 S. Ct. 1103, 1105-06, 31 L.Ed.2d 408, 413-14 (1972); *Coates v. Cincinnati*, 402 U.S. 611, 619-20, 91 S. Ct. 1686, 1691, 29 L.Ed.2d 214, 220-21 (1971) (White, J., dissenting).

7. *See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, _____, 104 S. Ct. 2839, 2847-48, 81 L.Ed.2d 786, 795-97 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633-35, 100 S. Ct. 826, 834-35, 63 L.Ed.2d 73, 85-86 (1980); *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 2309, 60 L.Ed.2d 895, 906 (1979); *Broadrick v. Oklahoma*, 413 U.S. 601, 611-12, 93 S. Ct. 2908, 2915-16, 37 L.Ed.2d 830, 839-40 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87, 85 S. Ct. 1116, 1120-21, 14 L.Ed.2d 22, 28-29 (1965); *KVUE, Inc. v. Austin Broadcasting Corp.*, 709 F.2d 922, 927-31 (5th Cir. 1983), *aff'd*, 465 U.S. 1092, 104 S. Ct. 1580, 80 L.Ed.2d 114 (1984); *Cf. United States v. Grace*, 461 U.S. 171, 103 S. Ct. 1702, 75 L.Ed.2d 736 (1983); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975).

8. *Cf. Ellis v. Dyson*, 421 U.S. 426, 434-35, 95 S. Ct. 1691, 1696, 44 L.Ed.2d 274, 282-83 (1975).

ing, molesting, abusing, or interrupting a policeman in the execution of his duty "in any manner." Although the trial court found that Hill had not proved that the ordinance has in fact been unconstitutionally applied, either to him or to others, and this finding of fact is not challenged on appeal, the issue before us is whether there is a substantial likelihood that the ordinance as interpreted by the City will deter constitutionally protected conduct. In deciding this, we look not only to the words of the ordinance but the manner in which the City has constructed it. The City itself has entitled the ordinance "Assaulting *or* interfering with policemen"—words that might be broadly interpreted. The City does not interpret the ordinance as applying only to an assault on a policeman or to willful interference with a policeman that obstructs the execution of his duties, but has insisted on the validity of the ordinance as literally read. The constitutionality of such an ordinance cannot be determined by looking only to the described kinds of conduct that the City may constitutionally proscribe, such as assaulting a policeman. Instead, we must also evaluate those parts of the ordinance that purport to, and may in actual practice be used to, punish only the verbal and expressive acts of objecting in a nonviolent manner to a policeman's conduct, of annoying a policeman, or addressing him in terms that he might consider abusive, of unintentionally disturbing a policeman, and even of unwittingly interrupting him.

The plaintiffs offered evidence of over 200 arrests that had been made for violation of the ordinance between November 1981 and March 1982. Violations are apparently so frequent that the City uses a printed form to report charges. The form reads:

Officers Names Badge No. Court Day Hour

IN MUNICIPAL COURT
CITY OF HOUSTON
HARRIS COUNTY, TEXAS

CAUSE NO. _____

COMPLAINT

THE STATE OF TEXAS

vs.

_____

_____

Arrest No. _____

Filed the __ day of _____, 19__

_____
Deputy Clerk, Municipal Court

WITNESSES:

_____

_____

_____

_____

_____

_____

Attorney Phone

_____

Address

_____

Amt. Bond Date Set Hour Court No.

_____

Receipt No. Initials

INTERRUPTING A POLICEMAN

Form No. JC-0038

Social Sec. No. Race Sex

Defendants Name Age

Address

Place of Arrest Time

Arresting Officers Badge No.

JUDGMENT RECORD — COURT MINUTES

IN CAUSE NO. _____

THE STATE OF TEXAS

vs.

_____

Date _____, 19__

This day this cause was called for trial, and both parties appeared, announced ready for trial, and the defendant pleaded _____ guilty _____ to the accusation in the complaint and waived _____ a trial by jury, and the court _____ having heard the evidence is of the opinion that the defendant is _____ guilty as charged. It is therefore ordered, adjudged and decreed that the State of Texas, for the use and benefit of the City of Houston, Texas, do have and recover of the defendant the sum of $_____, for which execution will issue, and in default of payment, that the defendant be committed to jail until said fine is paid.

_____
Judge, Municipal Court, Houston, Texas

_____

_____

_____

_____

_____

_____

_____

COMPLAINT: INTERRUPTING A POLICEMAN
City Code Sec. 34-11 Penalty: Not to Exceed $200.00

In the Name and by Authority of the State of Texas:

I, the undersigned affiant, do solemnly swear that I have good reason to believe, and to believe that _____ on or about the __ day of _____, 19__, and before the making and filing of this complaint, within the incorporated limits of the City of Houston, in the County of Harris, and State of Texas, did then and there wilfully or intentionally interrupt a city policeman, to-wit: _____ while said policeman was in the execution of his duty, in the _____ block of _____ Street, by _____ during an investigation being conducted by said policeman.

Against the peace and dignity of the State.

Affiant: _____

Subscribed and sworn to before me by affiant this __ day of _____, 19__

_____
Notary Public, Houston,
Harris County, Texas

The printed form reveals how the City officials interpret the ordinance. The form is not designed to be used for charges of assaulting or striking a policeman or for the charge of obstructing the police in the execution of their duties. It is, instead, a complaint for simply "Interrupting a Policeman." Although the ordinance itself does not require any specific intention, the complaint form seeks to remedy that evident defect: it inserts the additional words that the accused *"Wilfully* or *intentionally* interrupt[ed] a city policeman."

The list of charges offered in evidence shows the descriptive words used by the arresting officer on the charge form. These words do not necessarily describe with accuracy the conduct involved. Indeed, in Hill's case and the four others on which evidence was taken in the district court, they do not. But the list is nevertheless instructive because it provides examples of the kinds of activity that the city characterizes as offenses under the ordinances. In the majority of the cases listed, the charge made by the police describes conduct that is patently unlawful. In many instances, however, the malefactor is described as having done nothing more offensive to the public order than speaking or failing to remain silent. According to the charges listed in the appendix, the ordinance was invoked against what is described as "refusing to move on," "talking," "cursing," "interrupting," arguing with the police, and even "shooting the finger" at an officer. The list of charges demonstrates that the ordinance is officially regarded as penalizing the mere interruption of a policeman while in the line of duty. The City apparently sees no problem in characterizing "talking" and "arguing" as offenses under the ordinance. Though the ordinance obviously carries unnecessary words

("in any manner oppose"), the City has stood its ground, kept the language intact, and fought this lawsuit for years.

[3] The ordinance plainly encompasses mere verbal as well as physical conduct. In such a situation, as the Supreme Court said in *Members of the City Council v. Taxpayers for Vincent*,[9] "where the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack." The areas of protected conduct encompassed by the ordinance are more than mere "marginal applications in which the statute would infringe on First Amendment values."[10] A significant range of protected speech and expression is punishable and might be deterred by the literal wording of the statute.

[4] The real issue in this case, therefore, is only whether the overbreadth of the ordinance is or is not "substantial," the test applied in Justice White's opinion for the Court in *Broadrick v. Oklahoma*.[11] The Court in *Broadrick* warned that the application of the overbreadth doctrine is "strong medicine" and it is to be employed "sparingly and only as a last resort."[12] A statute is not unconstitutionally overbroad unless "the overbreadth of [the] statute is not only . . . real, but substantial as well,

9. 466 U.S. 789, 800 n. 19, 104 S. Ct. 2118, 2126 n. 19, 80 L.Ed. 2d 772, 784 n. 19 (1984) (citing *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217, 95 S. Ct. 2268, 2276-77, 45 L.Ed.2d 125 (1975)).

10. *Parker v. Levy*, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L.Ed.2d 439, 460 (1974).

11. 413 U.S. 601, 615, 93 S. Ct. 2908, 2918, 37 L.Ed.2d 830, 841 (1973).

12. *Id.* at 613, 93 S. Ct. at 2916, 37 L.Ed.2d at 840.

judged in relation to the statute's plainly legitimate sweep."[13]

Broadrick imposes stringent requirements that must be satisfied before a statute will be struck down as facially invalid, and a federal court, obedient to its mandate, should not hold a law unconstitutional merely because the law might, in some hypothetical or conjectural fashion, be construed to encroach on activities protected by the first amendment. If, however, *Broadrick's* requirements are met, paricularly when the City's interpretation of an ordinance demonstrates that its threat is real, not fanciful, overbreadth remains a basis for constitutional challenge. Since *Broadrick*, therefore, the Court has sustained a number of overbreadth challenges,[14] acknowledging that "the concept of 'substantial overbreadth' is not readily reduced to an exact definition."[15]

[5] There is a realistic danger of, and a substantial potential for, the unconstitutional application of the ordinance. Of the 231 charges offered in evidence, 42 resulted in forfeiture of a bond and 55 resulted in dismissal of the charges. Of the accused, 134 were found guilty and fined, but only seven fines were over $100, the minimum fine from which appeal to the state courts of appeal is per-

13. *Id.* at 615, 93 S. Ct. at 2918, 37 L.Ed.2d at 841.

14. *See, e.g., Federal Election Comm'n v. National Conservative PAC*, ____U.S.____, 105 S. Ct. 1459, 84 L.Ed.2d 455 (1985); *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L.Ed.2d 786 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975).

15. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 2126, 80 L.Ed.2d 772, 783 (1984).

mitted.[16] Thus, the charges against 24% of the accused were dismissed and, for reasons that may turn on inconvenience more than guilt, 18% of the accused merely forfeited a bond.

Many persons who might otherwise speak are likely to be silenced by the policeman's threat to invoke his authority. The fact the ordinance punishes as misdemeanors its violations and limits fines to $200 does not diminish the chill the enforcement of the ordinance creates. The real penalty is a trip to the city jail in the back of a squad car and having to post bond even if one later protests the charge and is found innocent. If one is found guilty, the additional penalty is a misdemeanor on his record for assaulting or interfering with a policeman. Like the vagrancy ordinance held unconstitutional in *Papachristou v. City of Jacksonville*,[17] the ordinance "set[s] a net large enough to catch all possible offenders," improperly leaving "it to the courts to step inside and say who could be rightfully detained, and who should be set at large."[18] The ordinance places virtually "unfettered discretion in the hands of the [Houston] police."[19]

IV.

The ordinance requires no *mens rea*. It may be violated whether or not the accused intended to interfere with or oppose a policeman. The ordinance requires no warning

16. Tex. Gov't Code Ann. § 30.278 (Vernon 1985).

17. 405 U.S. 156, 92 S. Ct. 839, 31 L.Ed.2d 110 (1972).

18. *Id.* at 165, 92 S. Ct. at 845, 31 L.Ed.2d at 117 (quoting *United States v. Reese*, 2 Otto 214, 221, 92 U.S. 214, 221, 23 L.Ed. 563, 565 (1875)).

19. *Id.*, 405 U.S. at 168, 92 S. Ct. at 846, 31 L.Ed.2d at 119.

to the possible offender that he may be interfering with or molesting a police officer. The ordinance has never been limited by any state court and the City itself has not suggested any interpretation that this court might use,[20] had it authority to do so. Refusing either to amend the ordinance or proffer a limiting instruction, the City has insisted on its validity as literally read.

The likelihood of a challenge to the ordinance in Texas state court is remote. Under Texas law a conviction of this misdemeanor is likely to be resolved at the county court level. Texas law provides no opportunity to attack the unconstitutionality of the ordinance, other than by direct appeal of a conviction, without the showing of irreparable injury to a vested property right. Absent that showing, no injunction or mandamus or declaratory judgment action may succeed in Texas courts.[21]

The ordinance has been in force since 1956 and has never been interpreted by any Texas court of record. Indeed, the constitutionality of the ordinance has been virtually immune to challenge by persons arrested under or intimidated by it. Before 1976, a defendant convicted in a municipal court of violation of a municipal ordinance had the right to appeal to the county court,[22]

20. *Compare Federal Election Comm'n v. National Conservative PAC*, ____U.S.____, ____, 105 S. Ct. 1459, 1471, 84 L.Ed.2d 455, 472 (1985).

21. *See Dearing v. Wright*, 653 S.W.2d 288 (Tex. 1983); *Texas Liquor Control Bd. v. Canyon Creek Land Corp.*, 456 S.W.2d 891 (Tex. 1970); *see also Bean v. Town of Vidor*, 440 S.W.2d 676 (Tex. Ct. App. 1969).

22. Tex. Code Crim. P. art. 4.08 (and its predecessors); *see Taylor County v. Jarvis*, 209 S.W. 405 (Tex. Comm'n. App. 1919); *Hickman v. State*, 79 Tex. Crim. R. 125, 183 S.W. 1180 (1916).

where he was entitled to a trial de novo.[23] If the defendant were found guilty in county court and were fined more than $100, he had the right to appeal to the Court of Criminal Appeals. In 1976, the Texas legislature made the Houston Municipal Court a court of record, and defendants convicted in municipal court then had the right to appeal to the county court on the record, rather than de novo.[24] If the county court affirmed the municipal court and the defendant were fined more than $100, he had a right to appeal to the Court of Criminal Appeals.[25] In 1981, the legislature gave the Texas courts of appeal jurisdiction over criminal appeals.[26] One convicted in a municipal court may now appeal on the record to the county court, but if he loses, his next appeal is to the court of appeals rather than the Court of Criminal Appeals and then only if his fine exceeds $100.[27]

The statutory maze is intricate but the result is simple. Despite nearly thirty years of enforcement, not one appeal to the Court of Criminal Appeals or any of Texas' fourteen courts of appeals has been reported.

V.

[6] It is textbook law that the ordinance would not be invalid for overbreadth if it were possible, applying well-

23. *Cf.* Tex. Const. art. V, § 16 (amended 1978).

24. *See Ex parte Spring*, 586 S.W.2d 482 (1978); Tex. Rev. Civ. Stat. Ann. art. 1200cc § 7 (Vernon Supp. 1985) (current version at Tex. Gov't Code Ann. § 30.269(b) (Vernon Supp. 1986)).

25. Tex. Rev. Civ. Stat. Ann. art. 1200cc § 21 (Vernon Supp. 1985) (current version at Tex. Gov't Code Ann. § 30.278 (Vernon Supp. 1986)).

26. Tex. Code Crim. P. art. 4.03 (Vernon Supp. 1986).

27. *See* Tex. Gov't Code Ann. § 30.278 (Vernon Supp. 1986).

established principles of statutory construction, for us to construe it narrowly so that it does not forbid protected speech.[28] A federal court faced with an overbreadth challenge to a statute or ordinance certainly may and should consider whether the enactment is *"readily* subject to a narrowing construction by the state courts."[29] But a federal court may not itself provide a limiting construction of legislation that is not so readily susceptible. Here, as in *Erznoznik v. City of Jacksonville*, "the possibility of a limiting construction [by the state courts] appears remote."[30] In *Erznoznik*, the Court found the statute unconstitutional, rejecting any construction that amounted to a "rewriting of the ordinance."[31] And we need not await an interpretation by the state courts at some far-off future date that would amount to "a remarkable job of plastic surgery upon the face of the ordinance,"[32] the Court's description of an Alabama Supreme Court's "interpretation" of an ordinance that had previously been repeatedly applied.

As a federal court, we should not strain to interpret a statute in a manner that renders it unconstitutional

28. *See, e.g., Regan v. Time, Inc.*, 468 U.S. 641, ____, 104 S. Ct. 3262, 3273, 82 L.Ed.2d 487, 500 (1984) (Brennan, J., concurring and dissenting in part).

29. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 & n.15, 95 S. Ct. 2268, 2276 & n.15, 45 L.Ed.2d 125, 135 & n.15 (1975) (emphasis added); *see also Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S. Ct. 2440, 2447, 49 L.Ed.2d 310, 319 (1976).

30. 422 U.S. 205, 216, 95 S. Ct. 2268, 2276, 45 L.Ed.2d 125, 135 (1975).

31. *Id.* at 216, n.15, 95 S. Ct. at 2276, n.15, 45 L.Ed.2d at 135, n.15.

32. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153, 89 S. Ct. 935, 940, 22 L.Ed.2d 162, 168 (1969).

and should, instead, attempt to read it as constitutional if its words permit. But we lack the power to tailor this city ordinance to a constitutional fit. Federal courts "do not sit as a 'super' state legislature, [and] may not impose [their] own narrowing construction onto the ordinance"[33] if the state courts have not already done so. As Justice Rehnquist has said, a statute invalid because of overbreadth must be "rewritten by the legislature or 'reinterpreted' by an authorized court,"[34] not upheld as constitutional. The principles of federalism forbid a federal appellate court to arrogate the power to rewrite a municipal ordinance. Our duty to uphold the Constitution is betrayed when we ferret out possible methods of rewriting municipal ordinances while admitting that we cannot ourselves provide a constitutional interpretation of the words before us.

No one doubts the need for an ordinance to protect police from assault, physical abuse, and from conduct that obstructs their legitimate law-enforcement activities. But the City cannot proscribe speech or other free expression that does not threaten immediate danger to the police or to legitimate law-enforcement endeavors.[35] Police "are trained to exercise a higher degree of restraint than the average citizen," Justice Powell has re-

33. *Beckerman v. City of Tupelo*, 664 F.2d 502, 509 (5th Cir. 1981) (citing *Brown v. Oklahoma*, 408 U.S. 914, 92 S. Ct. 2507, 33 L.Ed.2d 326 (1972); *Gooding v. Wilson*, 405 U.S. at 520, 92 S. Ct. at 1105, 31 L.Ed.2d at 413).

34. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, ____, 104 S. Ct. 2839, 2858, 81 L.Ed.2d 786, 808 (1985) (Rehnquist, J., dissenting).

35. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 524, 92 S. Ct. 1103, 1107, 31 L.Ed.2d 408, 415 (1972).

minded us.[36] They are expected to be disciplined and not so thin-skinned as to arrest bystanders for remarks that pose no danger to them or to the execution of their duties. Federal law, for example, finds it adequate to prohibit persons from forcibly assaulting, resisting, impeding or interfering with certain federal officers.[37] The City's interests can be served adequately by a narrowly drawn statute tailored precisely toward the conduct the City wishes to proscribe.

VI.

Raymond Hill is an activist, a troublemaker. Neither his criminal record, his character, nor his assertiveness, however, determines the constitutionality of the ordinance before us. The Constitution does not protect only decent, law-abiding people. The first amendment was designed to shield pesky, irritating, and contentious people, even busybodies and troublemakers.

"The police, our front line soldiers in the battle against crime," our late colleague Tate once wrote, "deserve the respect and support of our officials and citizens. Nevertheless, ever since this nation fought for and obtained its freedom, it has not been a crime to curse or use opprobrious language about the public officers of our democratic republic."[38] "Freedom of speech," he continued "is protected not only for our newspapers and politicians, but also for our citizens on back streets of slum areas."[39]

36. *Lewis v. New Orleans*, 408 U.S. 913, 913, 92 S. Ct. 2499, 2499, 33 L.Ed.2d 321 (1972) (Powell, J., concurring).

37. *See* 18 U.S.C. § 111.

38. *City of New Orleans v. Lewis*, 269 So.2d 450, 459 (Tate, J., dissenting).

39. *Id.* at 460.

For the reasons set forth above, Hill is entitled to a judgment declaring the ordinance invalid. We see no need for an injunction against its further enforcement for we are confident that the City will abide by our decision. Hill has failed to show that he sustained any actual damages as a result of his arrest. However, as the prevailing party on the issue of the ordinance's constitutionality, he is entitled to reasonable attorney's fees under 42 U.S.C. § 1988,[40] to be determined in accordance with the standards set forth in *Hensley v. Eckerhart*.[41]

For these reasons, we REVERSE the judgment of the district court and REMAND for a further proceeding consistent with this opinion.

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40. *See Familias Unidas v. Briscoe*, 619 F.2d 391, 405-06 (5th Cir. 1980); *Fernandez v. Limmer*, 663 F.2d 619, 624, 635, 636-37 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124, 103 S. Ct. 5, 73 L.Ed.2d 1395 (1982); *Gaery v. Edwards*, 759 F.2d 337, 339-40 (4th Cir. 1985); *Nasty v. Barrows Co.*, 660 F.2d 1327, 1334 n.10 (9th Cir. 1981).

41. 461 U.S. 424, 103 S. Ct. 1933, 76 L.Ed.2d 40 (1983).

APPENDIX

EXTRACT FROM EVIDENCE OF CHARGES MADE UNDER THE ORDINANCE OFFERED BY PLAINTIFF

Date of Arrest	Defendant	Alleged Offense	Disposition
Nov. 10, 1981	Huatko	Refusal to get off roof of burning building	Dismissed
Nov. 15, 1981	Paderes	Refusing to remain silent	Bond forfeit
Nov. 17, 1981	Canno	Refusing to leave	Forfeit
Nov. 18, 1981	Houston	Refusing to leave	Forfeit
Nov. 23, 1981	Webster	Failure to remain silent and stationary	Dismissed
Nov. 25, 1981	Williams	Refusing to move along	Dismissed
Dec. 6, 1981	Callendar	Refusing to leave scene when told to do so	Fined $35
Dec. 18, 1981	Garza	Remaining	Forfeit
Dec. 18, 1981	Derrick	Refusing to leave	Dismissed
Dec. 20, 1981	Faux	Refusal to leave scene	Dismissed
Dec. 30, 1981	Ferguson	Refusing to move at officer's request	$100 fine
Jan. 12, 1982	Givens	Arguing and yelling	Dismissed
Jan. 12, 1982	Willis	Arguing and yelling	Dismissed
Jan. 12, 1982	Cameron	Arguing	Dismissed
Jan. 12, 1982	Davies	Failure to leave scene of accident	Dismissed
Jan. 15, 1982	Rodriguez	Refusing to leave the scene	Forfeiture
Jan. 17, 1982	Bile	Refusing to leave scene	$75 fine
Jan. 31, 1982	Seminyato	Refused to leave the area	Forfeit

Date of Arrest	Defendant	Alleged Offense	Disposition
Jan. 31, 1982	Dimitrou	Refused to leave the area	Dismissed
Feb. 2, 1982	Guatando	Talking	Dismissed
Feb. 12, 1982	Underwood	Refusing to leave	Dismissed
Feb. 12, 1982	Jakes	Interfering	$75 fine
Feb. 14, 1982	Compos	Refusing to leave scene	$75 fine
Feb. 14, 1982	Williams	Refusing to leave scene	Dismissed
Feb. 20, 1982	Dorsey	Refusing to leave	$75 fine
Feb. 22, 1982	Apodoca	Failing to leave scene	$15
Feb. 29, 1982	Graves	Refusing to leave	$80 fine
Mar. 4, 1982	Ligon	Refusing to leave	$50
Mar. 5, 1982	Wright	Refusing to leave scene	$35
Mar. 8, 1982	Sanders	Failing to remain quiet	$50 fine
Mar. 13, 1982	Lee	Refusing to leave and talking	$41 fine
Apr. 27, 1982	Wong	Taking pictures of a crime scene from a location he was told was restricted	Not guilty
Dec. 19, 1982	Harbin	Arguing	Forfeit
Apr. 28, 1983	Long	Refusing to move	Dismissed
Nov. 17, 1981	Richardson	Verbal abuse	Bond forfeit
Jan. 9, 1982	Hall	Shot finger at officer	Dismissed
Jan. 23, 1982	Kelly	Cursing	Dismissed
Nov. 8, 1981	Ogle	Verbally yelling	Fine $81
Jan. 17, 1982	Smith	Interrupting	Fine $76
Jan. 30, 1982	Joseph	Disrupting interviews with available witnesses	Dismissed
Feb. 13, 1982	Canby	Talking loudly, walking through scene	$100 fine
Mar. 13, 1982	Arcenaux	[nothing was filled in]	Dismissed

PATRICK E. HIGGINBOTHAM, Circuit Judge, with whom CLARK, Chief Judge, GEE, GARWOOD, E. GRADY JOLLY, W. EUGENE DAVIS, and EDITH HOLLAN JONES, Circuit Judges, join, dissenting:

I

The gulf between the majority and the dissent in this case is profound. Our disagreement reflects different views of competing constitutional principles, different perceptions of the role of federal appellate courts in relation both to the federal trial courts and to the state court systems, and different interpretations of Supreme Court precedent. With respect, we reject the fundamental premises of the majority opinion, and we dissent.

This court is unanimous in rejecting plaintiff's contention that the ordinance was unconstitutionally applied in the actual case presented. But the majority proceeds to strike down the ordinance, even though it appears that no court—state or federal—has ever been asked to interpret its scope. Pointing to the doctrine of overbreadth, the majority infers that the absence of constitutional challenge, somehow, supports its suggestion that, somehow, Texas courts were not open. Nowhere, however, does the majority identify any barrier that Texas courts or Texas law has placed before any person who believes the ordinance is unconstitutional and who has standing to question it. The majority offers a confusing statement of Texas procedure and labels the appellate path of an appeal from a conviction under the ordinance a "maze." The label adds nothing. The Texas appellate structure follows a simple scheme familiar throughout Texas and the country. It has processed innumerable appeals of all kinds. If a maze, it is a widely understood one.

The only known challenger of the constitutionality of the ordinance is Hill. Should we then, by the reasoning of the majority, infer from the absence of previous challenges in *federal* court that we too have somehow silently deflected or deterred a decision on the constitutional question? The absence of contests in state courts is no more justification for the majority's preemptive strike than the absence of contests in federal courts would be for a contrary result.

The plaintiff's preference for a federal forum over a state appeal ought not be surprising. As the willingness of federal courts to relax the rules of standing and to strike down ordinances in their entirety increases, so also does the incentive to prosecute in the federal courts. Using the absence of a contest in an open state court to justify the exercise of federal power is circular and self-fulfilling. The refusal to wait for an actual case of unconstitutional prosecution must rest on one or more of four views poured into the plastic concept of substantial overbreadth: (1) that perceived threats to first amendment values weigh more heavily than the principles of article III; (2) that state courts are not to be trusted to decide a constitutional question properly; (3) that a Texas court could not readily construe the ordinance to save its constitutionality; and (4) finally, that the district court's findings of fact may be ignored and replaced by new facts found on appeal.

II

The majority lays great stress on its conclusion that "the ordinance is officially regarded as penalizing the mere interruption of a policeman while in the line of duty." and its repeated insinuation that the ordinance is

being applied in an unconstitutional manner. This is no more than a factual conclusion drawn by this appellate court from "a list of charges *offered in evidence*" (emphasis added). What is truly astonishing about the conclusion, apart from our newly found *power* to lift pieces of evidence out of a cold trial record and make our own factual findings, is that it is contrary to an explicit finding of the district court and depends on an inference that Hill's own highly capable counsel disavowed at oral argument.

The trial judge, having before him an abstract, prepared by Hill's lawyer, of shorthand statements made by arresting officers in police reports, and having heard proof about the circumstances under which Hill and four other persons were arrested, said: "The Court finds no evidence relating to the disposition of this type of case which shows that the ordinance is used to make improper or illegal arrests." Ignoring this unchallenged factual finding, the majority opinion relies on its own extract from Hill's abstract to suggest a contrary conclusion. Despite Hill's access to relevant court records, he offered no evidence about the circumstances of the arrests he chose to list. Hill did identify four other instances of allegedly unconstitutional application and attempted to prove them at trial. The district judge rejected all four assertions of unconstitutional application, and his findings are unchallenged. The result is that no unconstitutional application of the ordinance has even been found—and the majority is forced to hint that an example *could* be found, or simply that unchallenged factual findings may be ignored because "we know better." In choosing to infer something sinister from a selective summary of police officers' shorthand statements, the majority abandons the

role of an appellate court and takes on a different role for which it has neither authority nor competence.

At oral argument, Hill's counsel conceded that the record contained no proof that the ordinance had ever been applied in a manner that would violate the first amendment rights of any citizen; that he had no quarrel with Judge DeAnda's fact findings except with regard to the judge's conclusion that Hill's language was abusive to the officer; and that no inference of unconstitutional application could be drawn from the abstract of arrest reports on which the majority now relies.

III

Although our proposed opinion was not joined by a majority of the court, it continues to express our view of what the court should do. Its juxtaposition with the majority opinion should make our point: that despite the majority's effort to narrow the visible differences between its analysis and ours, an unrestrained quest for a desired outcome has led the majority to usurp the trial court's fact-finding role and to display an unseemly distrust of the Texas judiciary. Judicial modesty at the least requires that we keep within our role as a court of error and that we accept state courts as legitimate partners in a federal system. We would have had the court write as follows:

A

A Houston, Texas ordinance makes it a misdemeanor to assault or interfere with a police officer in the execution of his duty. We are urged to conclude that the arrest of Raymond Hill for violating the ordinance infringed

his right of free speech, or to conclude that the ordinance is in any event facially invalid because it is unconstitutionally vague or substantially overbroad. We reject all these arguments.

B

-1-

On February 14, 1982, Raymond Hill was arrested by uniformed police officers Kelley and Holtsclaw for violating section 34-11(a) of the Code of Ordinances of the City of Houston, Texas. The ordinance provides:

> Sec. 34-11. *Assaulting or interfering with policemen.*
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

Violation of the ordinance is a Class C misdemeanor, punishable upon conviction in the Municipal Court of the City of Houston by a fine not to exceed $200.00.

For reasons that have not been preserved in a record, a Houston municipal court acquitted Hill of the charge. Hill filed this suit, under 42 U.S.C. § 1983, claiming that his arrest was illegal and seeking money damages from the City of Houston and the arresting officers as well as injunctive and declaratory relief. He argued that he was arrested for exercising his right of free speech. He also argued that regardless of the particulars of his own arrest, enforcement of the ordinance should be enjoined or declared invalid because it is unconstitutionally vague and because its potential for applications to protected speech so preponderates over its concededly valid

applications that the ordinance is unconstitutionally overbroad. Before trial and by agreement, all claims against the two officers were dismissed and the City withdrew its jury demand. After a bench trial, the district judge rejected the constitutional attacks, upheld the arrest, and entered a judgment for the City. On appeal, a divided panel of our court voted to reverse and remand. The panel majority found that Hill had standing to question the ordinance under article III of the Constitution and concluded that the ordinance was unconstitutionally overbroad and invalid in its entirety. The panel majority did not decide whether the ordinance was unconstitutionally vague or whether, as applied, it denied Hill's right of free speech. We took the case en banc and now review the judgment of the district court.

-2-

At the time of his arrest, Raymond Hill was forty-one years old, a homosexual, and a resident of Houston, Texas. After serving five years in the state penitentiary for burglary convictions, Hill returned to Houston in 1975 and helped form the Houston Gay Political Caucus. He has since been a vocal advocate of the homosexual cause, and was on the Caucus' Board of Directors at the time of trial. In addition to employment as a paralegal, he also did radio shows for a local community service broadcasting station and, accordingly, carried a press badge.

Twice before and once after his February 14, 1982 arrest, Hill was charged with violating the challenged ordinance, although he was never convicted. He was familiar with the ordinance and had once before challenged its constitutionality in federal court; that case

was dismissed without decision. When arrested on February 14, 1982, Hill was as well-acquainted with the ordinance as the arresting officers, if not more so.

Nor was the confrontation with Officers Kelley and Holtsclaw mere happenstance. Hill testified that he made a practice of deliberately confronting policemen engaged in making arrests. He was disturbed by what he perceived to be police harassment of homosexuals, and he explained his response to such police conduct as follows:

> Well, I would rather that I get arrested than those whose careers can be damaged; I would rather that I get arrested than those whose families wouldn't understand; I would rather that I get arrested than those who couldn't spend a long time in jail. I am prepared to respond in any legal, nonaggressive or nonviolent way, to any illegal police activity, at any time, under any circumstances.

Thus, it was a sophisticated and confrontation-minded Hill who came to the street scene in the Montrose section of Houston on February 14, 1982.[1] Montrose is heavily populated with homosexuals and is an active "cruising" area that attracts both male and female prostitutes. Indeed, although Hill's arrest occurred shortly after midnight, the area still had heavy traffic.

Officer Kelley testified before the federal district court that the incident began when he observed a male civilian

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1. We draw out these background facts, not to suggest that Hill is entitled to any greater or lesser first amendment protection because of them, but in order to provide a more complete picture of the individual who confronted Officers Kelley and Holtsclaw. Most of these facts were brought out at trial by Hill himself, in an effort to show that he was a likely target for harassment by the local police. It is undisputed, however, that neither Kelley nor Holtsclaw knew Hill or his reputation before they arrested him.

attempting to direct traffic on a busy thoroughfare in the Montrose section. Kelley ordered this individual to the sidewalk, asked for identification, and noticed that the man was making guttural sounds and twitching motions that Kelley later learned were the result of a disability. As Kelley described the man:

> He was a very strange individual. His actions were extremely erratic and strange. He was twitching all of the time. . . . His whole body would jerk while he was speaking and I didn't know what to make of that. I didn't know if he was about to have a seizure or if he was being insolent or what. I had no idea what to think of it.

Before Kelley could determine the cause of this behavior, the man began walking away. Kelley explained:

> So while I was speaking to him, his mind seemed to wander and he just seemed to turn and walk away. I still had his I.D. in my hand and . . . he was walking away, twitching and making all kinds of strange noises from his throat.
>
> I told him to stop. I told him to come back and he kept walking. I walked behind him and kept telling him to stop and he kept walking, so I reached out and turned, took him by the arms and stopped him, turned him around.

To complicate matters, a crowd began forming while Kelley was trying to interrogate this unusual detainee. As he described it:

> I felt a crowd forming around me; there was numerous people walking up and down the sidewalks

> here and they were crossing the street and they were slowing down, but they all seemed to be converging and centering in an area right behind me here on the corner.

It was at this point that Raymond Hill entered the picture. He was standing in front of the crowd, "in charge" of it according to Kelley, and approximately seven or eight yards away from the spot where Kelley and the civilian detainee were standing. Kelley "heard Mr. Hill holler to me to leave him alone, he hadn't done anything wrong," but Kelley ignored the challenge and turned back to his investigation. Hill immediately yelled again, as Kelley described it, "[this] time . . . more loud, more boisterous . . . , 'I said, leave him alone. Why don't you pick on somebody your own size?' " Kelley interpreted the remark as somewhat threatening because of the tone Hill used: "[It was a v]ery loud, very strong voice. A commanding voice. In other words, it wasn't—he wasn't requesting me to leave him alone; he was demanding that I leave him alone."

In Kelley's view, Hill's rapport with the crowd contributed to the threat, and tensions were escalating. Indeed, Kelley asked Hill whether he was interrupting Kelley in his official duties as a policeman. Hill's response suggested to Kelley that Hill would, if necessary, physically interrupt the investigation: "[H]e looked directly at me, he placed his hands on his hips and in a very bold manner, said, yes. Why don't you pick on somebody my size?" It was at this point that Kelley, no longer able to ignore him, interrupted his interrogation and arrested Hill for violating the ordinance.[2]

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2. Hill's version of the incident is somewhat different, but the court below found Kelley's version more credible.

C

-1-

Article III of the Constitution establishes a jurisdictional threshold to be crossed by any citizen who would challenge the constitutionality of a statute. To meet this "case or controversy" requirement, Hill must "at an irreducible minimum . . . 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of [the City]' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472, 102 S. Ct. 752, 758, 70 L.Ed.2d 700 (1982) (citations omitted). Under this test, Raymond Hill had sufficient article III standing to question the constitutionality of the ordinance. The trial of Hill's damage claim included the issue of the ordinance's constitutionality, and Hill's adopted role as citizen-provocateur made his article III standing to seek injunctive and declaratory relief the more certain.[3] *See Ellis v. Dyson*, 421 U.S. 426, 434-35,

3. As pointed out in the panel opinion:

This was not the first time Raymond Hill had been charged with violating the ordinance. In 1975, Hill approached Officers Stoffel and Strodman while they were making a traffic arrest. Hill first wrote down the identification numbers on the officers' vehicle, and then walked to within arms' length of one of the officers on the side nearest the officer's revolver. Officer Stoffel asked Hill to move along. Instead of complying, Hill moved closer to the officers, and was then arrested. He was later tried and found not guilty.

In 1977, Hill was standing near the Asylum Bookstore, an adult arcade in which the police suspected illegal activities were in progress. When Hill observed vice squad cars parked nearby, he entered the bookstore and announced over the public address system that police officers were present and that the patrons should be prepared to produce identification. The patrons fled upon hearing the announcement, and Hill was arrestd for interfering with the investigation. The case was subsequently dismissed.

Finally, in October, 1982, eight months after he was arrested for the incident [now at issue], Raymond Hill was arrested for violating the ordinance when he refused to leave the immediate area where two police officers were investigating a car parked with an unknown, unconscious person inside. The charges were later dismissed when the arresting officers failed to appear in Municipal Court.

764 F.2d at 1159.

95 S. Ct. 1691, 1696, 44 L.Ed.2d 274 (1975).

Meeting the article III jurisdictional requirement for the assertion of his own claim, however, gives Hill no license to represent others who are not before the court. The Supreme Court has elaborated a prudential doctrine of standing under which "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 75 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). Hill's contention that the ordinance is facially unconstitutional is an attempt to fit within a narrow exception to this principle, and we will return to questions of standing when we consider his overbreadth and vagueness arguments.

-2-

The first amendment, which the Supreme Court has applied to the states through the fourteenth amendment, *Gitlow v. New York*, 268 U.S. 652, 666, 45 S. Ct. 625, 629, 69 L.Ed. 1138 (1925), undoubtedly protects Hill's rights to express publicly his opposition to such police actions at Officer Kelley's interrogation of the man who was trying to direct traffic in Montrose. That right is not

limited to speech aimed at passers-by, but includes objections directed to the police themselves, who undeniably function as representatives of government. But a "right" cannot be defined without reference to responsibility, which is its conceptual twin: Hill's right to speak out must be viewed in conjunction with his duty not to obstruct enforcement of the law. Expressed in the more familiar legal abstraction, the first amendment rights to speak and to petition are not absolute and may constitutionally be limited by content-neutral regulations that serve an important government interest by restricting the time, place, and manner in which those rights are exercised. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-48, 101 S. Ct. 2559, 2563-64, 69 L.Ed.2d 298 (1981).

We test the application of a restriction by examining the relationship between the prohibited words or conduct and the evil that government may legitimately seek to prevent. *See, e.g., Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L.Ed.2d 430 (1969); *see also Konigsberg v. State Bar of California*, 366 U.S. 36, 49-56, 81 S. Ct. 997, 1005-10, 6 L.Ed.2d 105 (1961). We weigh the government interests furthered by the suppression of speech against the importance of the speech affected, considering both the significance of the governmental objective and the availability of alternative forums for disseminating the views whose expression is restricted. *See, e.g., Heffron*, 452 U.S. at 649-55, 101 S. Ct. at 2564-68.

As we read Houston's prohibition of interference with police officers, it is a valid time, place, and manner regulation. In Section C.3, *infra*, we explain in more detail

why the ordinance may be read so as to keep it within the bounds imposed by the Constitution. For now it is necessary to point out only that the ordinance, to the extent that the City applies it at all to verbal conduct, is not a restriction on any particular message, whether addressed to the public or to police authorities. Rather, the ordinance forbids interference with police officers in the execution of their duties, and it limits the right to speak only to the extent that speech is used to create such interference. The restriction is content-neutral, and it undoubtedly serves the important state interest in law enforcement. *See Heffron*, 452 U.S. at 649-50, 101 S. Ct. at 2564-65; *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 1830, 48 L.Ed.2d 346 (1976).

Law enforcement is quintessentially a governmental function, and the police must often carry out that function in environments fairly teeming with obstacles, distractions and resistance. Accordingly, the City of Houston has a powerful and legitimate interest in probititing intereference with its officers while they are pursuing lawful investigations or executing lawful arrests. The City's interests extend to promoting the safety of its officers and of persons lawfully detained or arrested. This is not to say that citizens must submit to public authorities like docile lambs or fawning puppy dogs, and it is not to deny that "at the constitutional level speech need not be a sedative; it can be disruptive." *Colten v. Kentucky*, 407 U.S. 104, 122, 92 S. Ct. 1953, 1963, 32 L.Ed.2d 584 (1972) (Douglas, J., dissenting). But we must acknowledge that arrests and investigations are serious matters that often occur in delicate or dangerous situations: in such settings, challenges or annoyances that

might otherwise be an appropriate means of voicing opposition to the authorities may well present risks that are unacceptable when the constitutional balance is struck. The City has a strong interest in ensuring that its police officers can pursue their work without interference, whether caused by physical force or by "speech."

The Supreme Court addressed a similar situation in *Colten v. Kentucky*, 407 U.S. 104, 92 S. Ct. 1953, 32 L.Ed.2d 584 (1972). Colten was convicted under a disorderly conduct statute after he insisted on remaining at the scene of a traffic citation, despite police requests that he move on. Although Colten claimed that the first amendment protected both his right to advise the man who was getting the citation and his efforts to help arrange transportation for the driver and his passengers, the state courts found that Colten's only purpose was to aggravate, harass, and inconvenience the police as they issued the ticket. The Supreme Court affirmed the conviction and dismissed the first amendment defense:

> [Colten] had no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation at that time. The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident.

407 U.S. at 109, 92 S. Ct. at 1956.

Similar or greater risks were present when Hill challenged Officer Kelley on the Montrose streetcorner.

Whether or not Hill would have actually assaulted Officer Kelley had he not been arrested is unimportant—his threatening disruption was sufficient, as it was intended to be, to distract Kelley from his investigation of the disturbing and possibly ill or dangerous individual whose whole body jerked when he spoke. Hill's challenge, one that might have appeared harmless in other circumstances, seemed to Kelley quite threatening when offered in front of a converging crowd. Kelley explained that he "felt apprehensive towards the crowd because of Mr. Hill" and that he perceived the crowd as a threat to his own safety, to that of his detainee, and to that of his partner who was issuing a traffic citation nearby. It should be no surprise that Kelley was unwilling simply to turn his back on Hill and pursue his investigation.

In contrast, the impact of the ordinance on Hill's desire to exercise his right of free speech was relatively trivial. There are many other times and places at which the actions of law enforcement officials may be challenged; to restrict challenges made in the context of arrests or investigations does not significantly limit the opportunity to convey one's views on any matter of public interest. More importantly, the Constitution does not require an officer to adopt a "wait and see" attitude when threats interrupt an investigation or arrest. Furthermore, there is no reason to extend constitutional protection to speech whose only purpose is, as it was here, to distract a police officer in the performance of his duties. Hill conceded at trial that he was not trying to convey any information or opinions to the crowd, but rather was attempting to divert Kelley's attention from the detainee and if necessary to substitute himself as an arrestee. Hill supposedly feared that Officer Kelley's detainee might be-

come the victim of police brutality. Even if the record persuaded us that such a fear could have been based on something more than sheer speculation, which it does not, the first amendment neither authorizes nor protects from subsequent prosecution anti-government vigilante actions of this kind.

We conclude that Hill's arrest was constitutionally permissible under standard and well-settled doctrine. Because Hill's "speech" was merely a device for accomplishing an illegal act, *viz,* obstructing a lawful arrest or investigation, it was punishable for the same reason that laws against perjury, fraudulent advertising, solicitation of crime, conspiracy, and similar offenses are exposed to no constitutional objection: criminal conduct not aimed at communicating ideas or information cannot be brought under the aegis of the first amendment just because it takes a verbal form. *See e.g., Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456, 98 S. Ct. 1912, 1918, 56 L.Ed.2d 444 (1978); *Konigsberg v. State Bar,* 366 U.S. 36, 49 n. 10, 81 S. Ct. 997, 1006 n. 10, 6 L.Ed.2d 105 (1961); *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 69 S. Ct. 684, 690, 93 L.Ed. 834 (1949); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72, 62 S. Ct. 766, 768-69, 86 L.Ed. 1031 (1942); *Abrams v. United States,* 250 U.S. 616, 627, 40 S. Ct. 17, 21, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting); *Frohwerk v. United States,* 249 U.S. 204, 206, 39 S. Ct. 249, 250, 63 L.Ed. 561 (1919); *Schenck v. United States,* 249 U.S. 47, 52 39 S. Ct. 247, 249, 63 L.Ed. 470 (1919).

Even if we were to characterize the conduct for which Hill was arrested as including an element of "advocacy" the arrest would still be constitutionally permissible. Where "advocacy of the use of force or of law violation

. . . is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," the first amendment offers the speaker no protection. *Brandenburg v. Ohio,* 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L.Ed.2d 430 (1969) (footnote omitted). The *Brandenburg* test applies when a speaker is arrested *solely* for advocating lawless conduct—the test does not create any protection for otherwise illegal conduct that is accomplished with the aid of "advocacy." Because Officer Kelley's detainee was in fact left unrestrained when the officer was forced to turn his attention to Hill and the gathering crowd, there is no need to speculate about the imminence of the proscribable interference with the police or about the possibility that Hill's speech might have sparked a riot.[4]

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4. The *Brandenburg* test was recently reaffirmed in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S. Ct. 3409, 73 L.Ed.2d 1215 (1982). The Court rejected the argument that Charles Evers, leader of a boycott of white merchants in Mississippi, could be held civilly liable to the targets of the boycott because he made speeches that were likely to incite lawless action against them. The Court emphasized that Evers' political speeches had not in fact led to violence or unlawful conduct and concluded that he could not be held liable in tort for results that had not occurred. While employing a formula according to which "appeals for unity and action in a common cause [that] do not incite lawless action . . . must be regarded as protected speech," 458 U.S. at 928, 102 S. Ct. at 3434, the Court pointed out that Evers might well have been civilly liable if his speeches *had* incited unlawful conduct, *id.* at 927-28, 102 S. Ct. at 3433-34. Thus, *Claiborne Hardware* reaffirms the principle that "*debate on public issues* should be uninhibited, robust, and wide-open," *id.* at 928, 102 S. Ct. at 3434 (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L.Ed.2d 686 (1964)) (emphasis added), and does not create any new limits on government's power to protect itself and its citizens from proscribable conduct that occurs in the guise of speech or that takes the form of political advocacy. At any rate, Raymond Hill did disrupt Officer Kelley's investigation. As we will see, the Houston ordinance does not forbid advocacy alone or attempt to reach the proscribed evil at its incipiency.

As we have already noted, Raymond Hill had article III jurisdictional standing to challenge his arrest and prosecution under the Houston ordinance. Our decision upholding the application of the ordinance to the facts of Hill's case would ordinarily prevent him from raising further challenges to the validity of the ordinance: "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The Supreme Court has stressed that this general rule against *jus tertii* litigation is founded in grave, though prudential, principles of standing that counsel against deciding abstract questions about generalized or hypothetical grievances. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 759-60, 70 L.Ed.2d 700 (1982). The Court has candidly acknowledged that its cases have not defined article III standing "with complete consistency" and has accordingly emphasized that the prudential rule against *jus tertii* decisions is based on principles that bear a "close relationship to the policies reflected in the Art. III requirement of actual threatened injury amenable to judicial remedy." *Id.*, 454 U.S. at 475, 102 S. Ct. at 760.

As *Valley Forge* makes clear, the *jus tertii* rule and its closely related article III concerns are as important in first amendment cases as in any other. Nevertheless, it is also true that the Supreme Court has carved out a narrow exception to the general ban on asserting the rights of parties not before the court:

> At least when statutes regulate or proscribe speech and when "no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution," the transcendent value to all society of constitutionally protected expression is deemed to justify allowing "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity." This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Gooding v. Wilson, 405 U.S. 518, 520-21, 92 S. Ct. 1103, 1105-06, 31 L.Ed.2d 408 (1972) (citations omitted); *see also Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S. Ct. 2908, 2915, 37 L.Ed.2d 830 (1973) (overbreadth doctrine is based on "a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"), *quoted in Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. 2839, 2847 (1984).

Because the Houston ordinance is undeniably susceptible to applications that would impermissibly regulate or proscribe protected speech,[5] the *Gooding* doctrine allows

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5. After discussing the wide range of dictionary definitions for various words in the Houston ordinance, the panel majority observed:

> If a mother pleads with a policeman to "spare my baby" while the policeman arrests her son in front of their home, she has "opposed" the policeman in the execution of his duties. If a tourist sees two policemen on the street questioning a citizen, and stops to ask them directions to a hotel, the tourist has "interrupted" the officers in the execution of their duties. If a person in a crowd at a political function continually begs the

Raymond Hill to challenge the facial validity of the ordinance on grounds of overbreadth. He is allowed to do so because of the importance of maintaining a socially desirable atmosphere of freedom in which issues of public interest may be discussed and debated with only the minimum legal inhibitions required by public safety and order. Perceiving the risk that this atmosphere might be insidiously chilled if the courts were forced to await a challenge presented by an actual victim of an unconstitutional application of an overly broad statute, the Supreme Court has relaxed our usual standing requirements in order to reduce this risk.

This relaxation of standing requirements has not resulted in a tidy conceptual package. Indeed, the power of the social policy protecting against "chilled speech" is illustrated by how close the overbreadth doctrine comes to transgressing article III jurisdictional limits. In the occasional *jus tertii* case outside the first amendment area, the plaintiff ordinarily represents the interests of a nonparty who is an identifiable member of the dramatis personae in a script already before the court or that the court can write without any great exercise of its imagination. In overbreadth cases, by contrast, the courts have sometimes been willing to make constitutional decisions without focusing sharply on the identity of the parties whose rights are threatened. *Compare e.g., Gooding v. Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L.Ed.2d 408 (1972) (unidentified class of potentially chilled speakers), *with e.g., Carey v. Population Services Int'l*, 431 U.S.

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policeman to let him past the barricade, that person has "molested" the policeman in the execution of his duties.

764 F.2d at 1163. Although there is no reason to think that the City has ever applied the ordinance to such situations, we cannot fault the panel majority for noting that such hypothetical applications, however bizarre, are at least imaginable.

678, 97 S. Ct. 2010, 52 L.Ed.2d 675 (1977) (seller of contraceptives asserting rights of potential customers); *Craig v. Boren*, 429 U.S. 190, 97 S. Ct. 451, 50 L.Ed.2d 397 (1976) (seller of 3.2% beer asserting the rights of potential purchasers); *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868, 49 L.Ed.2d 826 (1976) (physicians asserting rights of their patients).

Whatever untidiness the overbreadth doctrine effects in the law of standing, the Houston ordinance is overbroad. This, however, is not to say that the constitutional challenge will necessarily succeed. Sensitive to the overbreadth doctrine's anomalous departure from well-settled prudential rules of standing and mindful of the close relation between those principles and the mandatory jurisdictional policies of article III, the Supreme Court has fenced in overbreadth with significant qualifications. These qualifications are designed to prevent the federal judiciary from becoming a roving commission that invalidates the people's will, as expressed through their popularly elected representatives, on the basis of essentially academic or hypothetical constitutional problems. First, if the challenged law has been, or could be, authoritatively construed so as to remove any realistic threat of unconstitutional application, the overbreadth doctrine may not be used to declare the law unconstitutional on its face. *See, e.g., Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916, 37 L.Ed.2d 830 (1973). Second, and in close relation to this rule requiring that a challenged statute's threat to protected speech be real, a statute may in any case not be struck down on overbreadth grounds unless its potential unconstitutional applications are substantial in relation to its permissible applications. *Id.*, 413 U.S. at 615, 93 S. Ct. at 2917.

We therefore must consider the facial validity of the Houston ordinance with these two crucial doctrinal limitations clearly before us.

Where the state courts have authoritatively construed a statute so as to forestall its application to speech or conduct protected by the first amendment, the overbreadth doctrine is inapplicable. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 522-23, 92 S. Ct. 1103, 1106-07, 31 L.Ed. 2d 408 (1972); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 770, 86 L.Ed. 1031 (1942). As to the Houston ordinance, the Texas courts have not yet put a limiting construction on the challenged provision. But they have not declined to do so. Those who violate the ordinance are tried in the municipal courts for the City of Houston, which have only recently been made courts of record. There is now an appeal as of right from those courts to the county criminal court. Tex. Gov't Code Ann. § 30.269(a) (Vernon 1985).[6] If the fine exceeds $100, a further appeal may be taken to the state courts of appeal. Tex. Gov't Code Ann. § 30.278 (Vernon 1985). The notion that we are bound by authoritative state court constructions of a statute, *see, e.g., New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S. Ct. 3348, 3361 n. 24, 73 L.Ed.2d 1113 (1982), logically has no application until the state courts actually

6. On appeals to the county criminal court, Tex. Gov't Code Ann. § 30.275(c) (Vernon 1985) provides:

> In each case decided by the appellate court, the court shall deliver a written opinion or order either sustaining or overruling each assignment of error presented. The court does not need to give a reason for overruling an assignment of error, but it may cite the cases on which it relied. If an assignment of error is sustained, the court shall set forth the reasons for the decision. The appellate court clerk shall mail copies of the decision to the parties and to the municipal judge as soon as the decision is rendered.

do give it some construction. It is for that reason that the Supreme Court has repeatedly recognized that a federal court faced with an overbreadth challenge may consider hypothesized limiting constructions as well as hypothesized unconstitutional applications. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60, 96 S. Ct. 2440, 2447, 49 L.Ed.2d 310 (1976); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 & n. 15, 95 S. Ct. 2268, 2276 & n. 15, 45 L.Ed.2d 125 (1975); *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916; *Dombrowski v. Pfister*, 380 U.S. 479, 490, 85 S. Ct. 1116, 1122, 14 L.Ed.2d 22 (1965).

Thus, we are not averse to proffering, sua sponte, plausible limiting constructions for the ordinance. In doing so, we do not impose a construction of the ordinance upon the Texas courts. Rather, we inquire into the range of plausible constructions that those courts might adopt, and we do so in order to determine whether the ordinance is substantially overbroad on its face. Both the principle of federalism and our reluctance to decide constitutional questions when they can be avoided require us to proffer such constructions where possible and assume that the state courts will construe the ordinance consistently with the constitutional command. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 397, 87 S. Ct. 534, 546, 17 L.Ed.2d 456 (1967).

Although the ordinance on its face may be susceptible to troubling constructions, it need not be so construed. The state courts could, for example, easily find an intent requirement in the ordinance; in that event, the ordinance would prohibit only conduct, verbal or non-verbal, that is intended to and actually does interfere with ongoing police activities: trivial, insignificant, or inadvertent "in-

terruptions" of the police would not be proscribed. Similarly, the ordinance need not be construed as applicable to all police functions—indeed its last clause suggests that the ordinance might be meant to operate only in the context of arrests and detentions. It certainly could be limited to *lawful* police functions, so that public challenges to unauthorized police activities would be unaffected.[7]

Without attempting to give the regulation a definitive construction here, we think it may safely be assumed, for purposes of our inquiry into the substantiality of the ordinance's overbreadth, that it could readily be limited to intentional interferences with ongoing lawful police work, whether that interference is achieved through verbal or physical action. Government ought to be able to prohibit conduct, or even so-called "pure speech," when it interferes with the police to such an extent that they are intentionally disrupted in the execution of their duties. There is no reason to assume that the City of Houston seeks to achieve more than that through the ordinance in question. Certainly, the City sought no more when it prosecuted Raymond Hill for his behavior on February 14, 1982.

While the prosecution of such conduct or speech may in the future pose some constitutional questions—indeed, there is probably no limiting construction of the ordinance that would give assurance against every imaginable impermissible application—the obvious availability of limiting constructions is relevant to our inquiry into whether

7. Although the Constitution allows certain verbal conduct to be proscribed, the state courts might even apply the canon of *ejusdem generis* to interpret the phrase "or in any manner oppose, molest, abuse or interrupt" as confined by the preceding clause in the ordinance to physical acts of the genre "assault or strike."

the ordinance is substantially overbroad. It is to that issue that we now turn.

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In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973), the Court tightened the restrictions on the doctrine of overbreadth. An Oklahoma statute prohibited certain of the state's civil employees from participating in partisan political activities, and the law was challenged on first amendment grounds. The Court recognized that "some persons' arguably protected conduct [might] be caught or chilled by the statute," *id.* at 618, 93 S. Ct. at 2919, but nonetheless found the provision constitutional. Justice White explained:

> Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Id. at 615, 93 S. Ct. at 2917 (citation omitted). The Court made clear in *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 1113 (1982), that the substantiality requirement in overbreadth analysis is not limited to expressive conduct but applies as well where so-called "pure speech" is regulated. Indeed, the *Ferber* Court relied on the substantiality requirement to uphold a child pornography law.

The substantiality requirement has by no means eviscerated overbreadth analysis, and the Court has sustained a number of overbreadth challenges since *Broadrick*. *See, e.g., Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L.Ed.2d 786 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L.Ed.2d 125 (1975). But *Broadrick* has also not proven to be a sport. *See, e.g., Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S. Ct. 2118, 80 L.Ed.2d 772 (1984); *New York v. Ferber*, 458 U.S. 747, 102 S. Ct. 3348, 73 L.Ed.2d 947 (1982); *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L.Ed.2d 15 (1974). The Court has acknowledged:

> The concept of "substantial overbreadth" is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. On the contrary, . . . there must be a *realistic* danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

Taxpayers for Vincent, 104 S. Ct. at 2126 (footnote and citation omitted) (emphasis added). Ironically, because there is not a more clearly stated constitutional test, it is a case-by-case inquiry that determines whether a statute will be read on a case-by-case basis. This inquiry necessarily reflects intuitive judicial valuations in a fashion that gives only limited guidance to subordinate courts.

There are, however, informing principles that mitigate this difficulty.

First, the substantiality requirement embodies a reconciliation of competing constitutional values. Striking down a statute that has at its core permissible inhibitory functions simply because it might be construed to apply to conduct protected by the first amendment is in sharp tension with our constitutionally footed devotion to the decision of actual cases. The substantiality requirement does much to alleviate this tension, for it recognizes that application of the overbreadth doctrine is "manifestly strong medicine," and ensures that it will in fact be applied "sparingly" and "as a last resort." *Broadrick*, 413 U.S. at 613, 93 S. Ct. at 2916. Thus, while Hill has jurisdictional standing to launch an overbreadth challenge, every such challenge rests on hypothetical applications to hypothetical person in hypothetical cases, and the substantiality requirement ought to be applied stringently. To dilute the substantiality requirement would betray a myopic focus on first amendment values to the exclusion of equally important principles involving federalism and article III limits on judicial power and the judicial role. Without in any way denying that overly broad statutes can have an unacceptable chilling effect on freedom of speech, we must be cautious not to engage in hyperbole and fevered speculation about imagined and unlikely threats. The chilling effect about which we are properly concerned will be signalled by objective facts such as the level of penalty, the spontaneity of the anticipated speech that is at risk of being chilled, and the opportunity to contest specific applications of the statute. When, as here, the penalty is a misdemeanor and the constitutionality of its appli-

cation can be raised defensively,[8] the risk of a chilling effect is lessened.

Second, substantiality is informed by the character of the regulation. When, as here, the challenged law is inhibitory and noncensorial in its operation, we ought to be more willing to leave its hypothetical applications to other concrete cases, *see Broadrick*, 413 U.S. at 616, 93 S. Ct. at 2918, because first amendment concerns are mitigated when the regulation does not rest on unacceptable valuation of the substantive content of the regulated speech. To the extent that the Houston ordinance applies at all to verbal conduct, it could be construed to proscribe only speech that is not made with a bona fide intention to exercise a constitutional right, but solely with the intention and result of interfering with lawful police functions. As with the disorderly conduct statute at issue in *Colten v. Kentucky*, the ordinance "comes into operation only when the individual's interest in expression, judged in the light of all relevant factors, is 'minuscule' compared to a particular public interest in preventing that expression or conduct at that time and place." *Colten*, 407 U.S. at 111, 92 S. Ct. at 1158. As with the statute in *Colten*, the potential reach of this ordinance does not seriously and manifestly threaten the constitutionally protected conduct of anyone; certainly it does not present so grave a threat that we must strike it down as *substantially* overbroad.

Finally, we note that the Supreme Court has:

8. First amendment challenges to a statute, including those based on substantial overbreadth, may be raised as a defense in a criminal prosecution under Texas law. *See, e.g., Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim. App. 1984); *Al-Omari v. State*, 673 S.W.2d 892, 896-98 (Tex. App.—Beaumont 1983, writ ref'd).

> repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, factual invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .'

Parker v. Levy, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563, 41 L.Ed.2d 439 (1974) (citation omitted), *quoted in New York v. Ferber*, 458 U.S. 747, 771 n. 25, 102 S. Ct. 3348, 3362 n. 25, 73 L.Ed.2d 1113 (1982). For that reason, the Supreme Court ordinarily finds a statute void for overbreadth only when it, unlike the Houston ordinance, defines "no central core of constitutionality regulable conduct." *Ferber*, 458 U.S. at 771 n. 26, 102 S. Ct. at 3362 n. 26.

It is apparent that the Houston ordinance has three related cardinal qualities that support its validity. First, it defines a central core of indisputably regulable conduct. Second, its central focus is not on speech but on conduct —"assault, strike . . . molest . . . abuse." Third, the ordinance forbids constitutionally unprotected results and does not purport to reach the proscribed evil—disruption of law enforcement—at an incipient level. With these principles in mind and judging imagined impermissible applications of the Houston ordinance "in relation to . . . [its] plainly legitimate sweep," *Broadrick*, 413 U.S. at 615, 93 S. Ct. at 2918, we are not persuaded that it is substantially overbroad.

D

Hill also asserts that the Houston ordinance is unconstitutionally vague. The due process doctrine of vague-

ness, however, has traditionally not allowed a plaintiff to assert the rights of third parties: "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S. Ct. 1186, 1191, 71 L.Ed.2d 362 (1982) (footnote omitted). There is seldom cause to relax the usual principles of *jus tertii* when a constitutional challenge is based on vagueness rather than overbreadth: the problem with a vague statute lies less in its chilling effect on protected speech than in its infringement on personal rights of notice and fair treatment. Accordingly, a law that satisfies the first amendment overbreadth test cannot be held void for vagueness unless it is "impermissibly vague in *all* of its applications" *id.* at 497, 102 S. Ct. at 1193 (emphasis added), so that "no standard of conduct is specified at all," *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 1688, 29 L.Ed.2d 214 (1971), as, for example, in a proscription of "all speech not protected by the Constitution."

Prior to his 1982 arrest, Hill was intimately familiar with the Houston ordinance and with how it was applied by the Houston police. Indeed, before arresting Hill, Officer Kelley specifically asked him whether he was interrupting Kelley in his official duties as a policeman. Hill knew that the conduct for which he was about to be arrested was proscribed by the ordinance and his right to due process was therefore not infringed by his arrest.

In *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L.Ed.2d 903 (1983), the Supreme Court identified a small class of cases in which a statute that is not

necessarily vague in all its applications may nonetheless be facially invalid under the due process clause. The criminal statute at issue in *Kolender* required persons subjected to questioning under the standards of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), both to provide "credible and reliable" identification and to "account for [their] presence" to the satisfaction of the police officer making the *Terry* stop. 103 S. Ct. at 1856, 1859-60. The *Kolender* Court concluded that this statute, which provided "*no* standard for determining what a suspect has to do in order to satisfy the requirement to provide a 'credible and reliable' identification," 103 S. Ct. at 1859 (emphasis added), gave such unbridled and unguided discretion to the individual policeman that it effectively delegated the legislative function to the *ad hoc* private judgment of the cop on the beat, *id.* at 1860 (citing *Smith v. Goguen*, 415 U.S. 566, 575, 94 S. Ct. 1242, 1248, 39 L.Ed.2d 605 (1974)); *see also* 103 S. Ct. at 1859 n. 7. *Kolender* held that this specific statute violated the due process clause "because it *encourage*[*d*] arbitrary enforcement by failing to describe with *sufficient* particularity what a suspect must do in order to satisfy the statute." 103 S. Ct. at 1860 (footnote omitted) (emphasis added).

By contrast, the Houston ordinance describes the proscribed conduct with considerable particularity, as we have already explained in our discussion of substantial overbreadth. To the extent that "vagueness and overbreadth [are] logically related and similar doctrines," *Kolender*, 103 S. Ct. at 1859 n. 8, the ordinance survives the *Kolender* test for the same reasons that it survives the overbreadth challenge. *See also Hoffman Estates*, 455 U.S. at 497, 102 S. Ct. at 1192 (overbreadth analysis

disposes of most vagueness issues). The Houston ordinance is not on its face so lacking in objective standards that it "encourages arbitrary enforcement," *Kolender*, 103 S. Ct. at 1860, or "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 92 S. Ct. 2294, 2299, 33 L.Ed.2d 222 (1972); furthermore, the record does not indicate that the ordinance has resulted in "harsh [or] discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," *Kolender*, 103 S. Ct. at 1860 (quoting *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 847, 31 L.Ed.2d 110 (1972), and *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S. Ct. 736, 741-42, 84 L.Ed. 1093 (1940)). The ordinance is therefore not facially unconstitutional under *Kolender*.

E

In sum, we are persuaded that the Houston ordinance was constitutionally applied to Raymond Hill for his conduct on the Montrose streetcorner. Furthermore, his challenge to the facial validity of the provision, which is based on the claim that the ordinance threatens the constitutional rights of others, cannot be sustained. An interpretation of the ordinance that would confine its application to constitutional proportions is possible, indeed likely, and we must give the courts of Texas a chance to so limit it. Constitutional problems that today are only hypothetical can and should be left for the time when they become real and concrete. We would affirm the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-1189

RAYMOND WAYNE HILL

v.

THE CITY OF HOUSTON, TEXAS

(Filed February 16, 1984)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This cause having been tried upon the facts without a jury, the Court hereby enters the following Findings of Fact and Conclusions of Law, pursuant to Rule 52(a), F. R. Civ. P.

FINDINGS OF FACT

The Defendant City of Houston has enacted Section 34-11(a) of the Code of Ordinances of the City of Houston ("the ordinance"). This ordinance reads as follows:

> Sec. 34-11. *Assaulting or interfering with policemen.*
>
> (a) It shall be unlawful for any person to assault strike or in any manner oppose, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

Violations of this ordinance are punishable as a Class C misdemeanor with a fine not to exceed $200.00. Persons

arrested under this Section are tried in the Municipal Court of Houston, Texas.

The Houston Police Department is currently enforcing the ordinance by way of arrests and criminal prosecutions. The Police Department was enforcing the ordinance at all times material to this lawsuit.

On February 14, 1982, J. L. Kelley and R. D. Holtsclaw ("the officers") were acting as uniformed patrol officers for the Houston Police Department.

On the date mentioned immediately above, the officers had apprehended a traffic violator at the intersection of Westheimer and Whitney Streets in Houston. While they were issuing a citation, the officers noticed one Charles Hill (no relation to the Plaintiff) standing in a heavily travelled lane of traffic on Westheimer, "directing" vehicles. Charles Hill was stopping vehicles, including a city bus. Officer Kelley approached Charles Hill and began speaking with him. Shortly thereafter, the Plaintiff began shouting abuses at Kelley in an admitted attempt to divert Kelley's attention from Charles Hill.

Officer Kelley asked the Plaintiff if he was interefering and warned him that if he was, he would be charged for interference with an officer. The Plaintiff responded that he was indeed interfering and that he thought no judge would find him guilty. The Plaintiff was arrested by the officers and charged with violating the ordinance.

At the time of this arrest, the Plaintiff was clearly engaged in intentional conduct which violated the ordinance since his verbal assaults were meant to interrupt an on-going police investigation.

The officers acted with probable cause in making this arrest of the Plaintiff.

The Plaintiff deliberately provoked the officers into making this arrest.

The evidence establishes that the arrest was not made for any purposes of harassment.[1] Rather, the record shows that the officers did not even know the identity of the Plaintiff prior to his arrest on February 14, 1982.

As noted above, the Houston police make arrests under the ordinance. These cases are disposed of by either a bond forfeiture, a dismissal, or a finding of guilty or not guilty upon the conclusion of a trial in Municipal Court. Convictions are frequently obtained under this ordinance, although the Plaintiff was found not guilty by a jury regarding the February 14, 1982 arrest. The Court finds no evidence relating to the disposition of this type of case which shows that the ordinance is used to make improper or illegal arrests.

The Plaintiff has adduced evidence regarding the arrest of four other individuals under the ordinance in an attempt to show misapplications in enforcement of the ordinance. The Court makes the following findings regarding this evidence.

Steven A. Long is a news photographer for KPRC (Channel 2) in Houston. Mr. Long was arrested for violating the ordinance on April 28, 1983, by Houston police officer Sgt. Thomas P. Null.

Mr. Long's arrest arose out of an incident related to a shooting aboard a city bus. Long received word of the

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1. The Plaintiff is a gay rights activist who claims that the Houston police have "systematically" harassed him "as the direct result" of his sexual preferences.

shooting over his dispatch radio and proceeded to the 4800 block of the Katy Freeway (I-10). The bus was stopped in the westbound lanes of I-10. Long parked in the eastbound lane nearest the median and began filming the incident in a lane of moving traffic. The police asked all media personnel to move onto the grass in order to minimize the traffic hazard they were creating.

Mr. Long subsequently moved into the westbound area between the bus and the Lifeline helicopter. He was outside the yellow "police tape" but was asked by police to move out of the way when the victim was being carried to the helicopter. (The police use this tape in an attempt to delinate the immediate area of an on-going investigation.) Long responded by saying that he was outside the yellow tape and (therefore) did not have to move.

The path from the bus to the helicopter was not cordoned off by the tape simply because the police had run out of tape. (The area in question was quite large.) When the stretcher was being carried beyond the tape to the helicopter, the police warned all media personnel to move back and clear a path. Everyone complied except Mr. Long and one other newsman. Sgt. Null then arrested Mr. Long.

The news media have a duty to inform the public of important events. The media understandably wishes to obtain the most immediate coverage and the "best shots" possible. The police must provide protection to the public, investigate crimes and accidents fully and maintain safe conditions wherever possible. It should be obvious that these two sets of interests often collide. In the case of Mr. Long's arrest, such a collision occurred. The evidence shows that some overzealousness occurred on both sides

of the altercation between Long and the police. Nonetheless, the Court finds that Mr. Long was indeed engaged in activity which interferred with necessary and customary police operations. Hence there was probable cause for his arrest under the ordinance.

Mr. Jimmy Wong was working as a KHOU news photographer on April 27, 1982. On that date, Wong was covering an incident involving a dangerous gunman near Lee Road and Jetero Blvd. (This incident occurred prior to the utilization of the yellow tape by the police.) The suspect had thrown his gun and various other items out the window of his car. Mr. Wong approached these items and got within approximately six feet of the pistol. The identity of the other items was unkown at that point. The media had been warned to stay clear of this immediate area, but Mr. Wong failed to do so. Sgt. Null placed his hand over Wong's camera and pushed Wong back from this area. Wong was subsequently arrested for violating the ordinance.

As with Mr. Long, the Court finds that Mr. Wong was acting in a manner that could be reasonably construed as interfering with normal police activity. While Wong was not standing in the path of a stretcher, he was in very close proximity to evidence. Further, since the police could not be sure what items had been tossed from the car by the suspect, it was necessary for them to prevent any members of the public, including the media, from coming into contact with what reasonably could have been dangerous instrumentalities. Mr. Wong was warned to stay clear of the area and declined to do so. The police had probable cause to arrest him for violating the ordinance.

Carl Feutral was arrested for violating the ordinance on July 17, 1981, in the 11200 block of South Wilcrest by Officer Kathy Incerto. Officer Incerto was investigating the scene of a fatal car accident when she observed Mr. Feutral walking toward her with a camera in his hand. He identified himself as a member of the Harris County Accident Bureau who compiled studies of major accidents. Incerto told Feutral he could take close-up photographs as soon as she had finished her investigation.

Feutral walked past one of the cars involved in the collision. The car was leaking gasoline. Incerto then asked Feutral to move away from the area and he walked up to the large crowd which had gathered near the perimeter of the accident site. The accident victim expired shortly thereafter and Incerto went to her squad car, at which point she saw Feutral standing next to the car in which the victim lay. Feutral began to walk away as Incerto approached him and was arrested for interfering with her investigation.[2]

Officer Incerto obviously had not completed her investigation at the point in time when Mr. Feutral was seen standing next to the car with the victim inside. Mr. Feutral had been warned to stay clear of the investigation site until the evidence-gathering process was complete but he failed to do so. His subsequent arrest for interference was made with probable cause.

Mr. Edward Benton was arrested on the night of August 7, 1982, for interfering with Houston vice squad officers in the course of their investigation of a strip

2. The complaint against Feutral also involved another city ordinance requiring people to remain 100 feet from the scene of an accident. Incerto made it clear on the witness stand that she intended to arrest him for interfering with her investigation.

joint located in the 3200 block of the South Loop West. Mr. Benton had come to his office, which is located next to the "Southern Comfort" and "Crystal Pistol" lounges. The lounges are well-known nude dancing clubs. Mr. Benton works as a business consultant to lounges and night clubs.

When Mr. Benton arrived that night, he spoke briefly to a woman who works in one of the lounges. The woman told him there were men with guns in the "Southern Comfort." Benton went to the door and a man told him the club was closed. Benton then falsely identified himself as an employee in an attempt to gain entry. At that point, a vice squad officer identified himself and warned Benton he should leave. Benton refused and was arrested for violating the ordinance.

The Court finds that Mr. Benton persisted in his attempts to gain entry to the club even after he was informed that the club was closed due to an on-going investigation by the vice squad. The arrest was made with probable cause.

The Court notes that in each of the four instances discussed above, the arrestees were warned by the police that they should desist from interrupting (or interfering with) on-going police matters prior to actually being arrested. These are *not* instances where someone unwittingly stumbled upon an investigation. Moreover, the facts surrounding each of these arrests (especially regarding Messrs. Long, Wong and Feutral) show that the police were acting in a manner calculated to insure either someone's personal safety or preservation of evidence, or both. The police acted in a reasonably prudent fashion under the various circumstances at hand.

The Court finds that the totality of the evidence regarding the arrests discussed above shows that the ordinance serves a public need and facilitates the execution of the usual duties of the Houston police.

In each of the above instances, the police had probable cause for making arrests under the ordinance.[3] There is no credible evidence which indicates that any of the arrests were made in bad faith or for purposes of harassment.

The wording of the ordinance is sufficiently definite to put a person of reasonable intelligence on fair notice of what actions are forbidden. In particular, the Court finds that the use of words such as "interrupt" are sufficiently clear by virtue of their commonly-understood, everyday definitions. Interrupt commonly means to cause one to cease, such as stopping someone in the middle of something. The Plaintiff, for example, clearly "interrupted" the police officers regarding the Charles Hill incident.

Finally, we turn to the facts regarding the arrest of the Plaintiff for violating the ordinance on several occasions which occurred prior to his arrest on February 14, 1982.

On August 31 ,1975, the Plaintiff intentionally interrupted officers D. A. Stoffel and F. E. Strodtman while they were conducting a traffic arrest in Houston's Montrose area. While the arrest was in progress, the Plaintiff wrote down license plate numbers and then walked to within an arm's length of one of the officers on the side

3. The Plaintiff has stressed that none of the arrests discussed above resulted in convictions, and that this fact somehow illustrates the illegality of the ordinance and its enforcement. This fact is clearly irrelevant, however, to determining whether the arrests were made in good faith and with probable cause.

nearest the officer's revolver. Officer Stoffel asked the Plaintiff to move along. Instead of complying, the Plaintiff insisted on moving closer. He was warned to move on but refused, whereupon he was arrested.

In 1977 (the exact date is unclear), the Plaintiff was standing near the Asylum Bookstore, an adult arcade in which police officers suspected illegal activities were in progress. When he observed vice squad cars parked nearby, he entered the bookstore and announced on the public address system that police officers were present and that the patrons should produce their identification. Of course, this announcement effectively frustrated the investigation and patrons fled upon hearing the announcement.[4] The Plaintiff was arrested.

On October 3, 1982, the Plaintiff was arrested at night when, after being asked to move along, he refused to leave the immediate area of a car with an unknown, unconscious suspect inside.

The Plaintiff testified as to the details of other arrests but they are not germane here.

The Plaintiff is intimately acquainted with the ordinance. He has read it and he has been arrested under it on a number of occasions. Each time he was arrested, he felt or believed he was not in violation of the ordinance but it is undeniable that he had actual knowledge of the ordinance.

4. The Plaintiff wants us to believe that he made the announcement in an attempt to comply with the law. This is patently ridiculous, especially in light of the Plaintiff's previous statements to the effect that no law enforcement officer has a right to ask for a person's identification. The Asylum incident is an example of the Plaintiff's disingenousness.

The record regarding the Plaintiff's arrests for violations of the ordinance demonstrates that he has "baited" the police and intentionally provoked them into arresting him on several occasions.

CONCLUSIONS OF LAW

This Court has jurisdiction of this cause pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

In *United States v. Varkonyi,* 645 F.2d 453 (5th Cir. 1981), the appellant challenged the constitutionality of 18 U.S.C. § 111. Section 111 is very similar to the ordinance at issue here.[5] The appellant had shoved an immigration officer and locked him out of a building in which illegal aliens were hiding. The *Varkonyi* court concluded that this conduct went beyond the exercise of any constitutionally protected rights and therefore the appellant lacked standing to attack the statute's constitutionality on the grounds that it impliedly might be unconstitutional if applied to other persons or situations. *Id.,* at 457.

The Supreme Court has stated that a plaintiff who engages in some conduct that is clearly proscribed by a statute cannot complain of the vagueness of the law as applied to the conduct of others. *Village of Hoffman Estates v. Flipside,* ____U.S.____, 102 S. Ct. 1186, 1191 (1982). It is incumbent on a court in a case such as this one to examine the complainant's conduct before analyzing other applications of the challenged law. *Id.* In this

5. Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both. 18 U.S.C. § 111.

case, the inexorable conclusion to be drawn from the facts relating to the Plaintiff's conduct vis-a-vis the ordinance is that he cannot complain of any vagueness under the *Flipside* test. *See also, Parker v. Levy,* 417 U.S. 733, 756 (1974).

The instant case is distinguishable from *Norwell v. Cincinnati,* 414 U.S. 14 (1973), which held (*inter alia*) that a person cannot be punished for merely voicing an objection to the authority of a police officer in a non-provocative manner. Here the facts demonstrate that the Plaintiff deliberately provoked the police into arresting him for violations of the ordinance on several occasions. Hence *Norwell* is not applicable.

Courts usually disregard the rule which forbids one whose conduct is clearly proscribed by a law from challenging it on the basis of how it has been applied to other persons (*Flipside; Varkonyi, supra*) when First Amendment interests are at stake. *See e.g., Village of Schaumberg v. Citizens for a Better Environment,* 444 U.S. 620 (1980). This Court should not disregard the rule in the instant case since we conclude that the Plaintiff has not succeeded in raising any valid First Amendment claims. Under the peculiar facts of this case, and in light of the specificity of speech and conduct which is proscribed by the ordinance, the Court concludes that the ordinance simply does not infringe on any substantial right of political (or even "commercial") free speech. Therefore, cases such as *Village of Schaumberg, supra,* do not apply here.

Based on all of the above considerations, the Court concludes that the Plaintiff lacks standing to challenge the alleged overbreadth and vagueness of the ordinance.

Assuming *arguendo* that the above analysis and conclusions regarding standing are incorrect, we now turn our attention to the issues of vagueness and overbreadth.

In a facial challenge to a law, a court must first determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not (as here), then the overbreadth challenge must fail, and the court should examine the facial vagueness challenge and uphold the challenge only if the enactment is impermissibly vague in all of its applications. *Flipside,* at 1191 and cases cited therein. In order to sustain a challenge for vagueness, the plaintiff must show that the enactment is so vague that no ascertainable standard of conduct is specified at all. *See e.g., Coates v. City of Cincinnati,* 402 U.S. 611 (1971).

The Court reiterates its conclusion that the ordinance does not, at least facially, proscribe speech or conduct which is protected by the First Amendment. Further, we found as a matter of fact that a person of reasonable intelligence could readily ascertain the meaning of the ordinance. The law cannot mandate the sort of mathematical precision which the Plaintiff seems to be demanding regarding the wording of a "prohibitive" type of statute or ordinance. Rather, a law of this type is sufficiently clear if it delineates its reach in words of common understanding. *Grayned v. City of Rockford,* 408 U.S. 104 (1972). Under this standard, the ordinance is not fatally vague, as a matter of law. *See also Cameron v. Johnson,* 390 U.S. 611 (1968).

We note that the *Varkonyi* case applies here, not only regarding standing but regarding vagueness as well. 18 U.S.C. § 111 was found by the *Varkonyi* court to pass

constitutional muster on the question of vagueness. This Court concludes that the ordinance is sufficiently similar to Section III to trigger the application of *Varkonyi* to this case. Therefore, both *Grayned* and *Varkonyi* lead us to conclude that the ordinance is sufficiently definite.

Under the tests of *Flipside* and *Grayned, supra,* the Court concludes that the ordinance is not overly broad. The ordinance is constitutional.

Finally, in light of the particular facts at hand and under the authorities discussed above, the Court concludes that the application of the ordinance vis-a-vis the Plaintiff was not unconstitutional.

In sum, the Plaintiff is not entitled to injunctive relief, declaratory relief, monetary damages, expungement of his criminal record, or attorney fees. Final judgment shall be entered in favor of the Defendant. All taxable costs will be assessed against the Plaintiff.

DONE in Houston, Texas, this 16th day of February, 1984.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-82-1189

RAYMOND WAYNE HILL

v.

THE CITY OF HOUSTON, TEXAS

(Filed February 16, 1984)

FINAL JUDGMENT

In accordance with the Court's Findings of Fact and Conclusions of Law filed in the above-referenced action on this date, judgment is hereby entered for the DEFENDANT City of Houston.

All taxable costs are assessed against the Plaintiff, Raymond Wayne Hill.

This is a Final Judgment.

DONE in Houston, Texas, this 16th day of February, 1984.

/s/ JAMES DeANDA
James DeAnda
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2181

D.C. Docket No. CA-H-82-1189

RAYMOND WAYNE HILL,
Plaintiff-Appellant,

v.

THE CITY OF HOUSTON, TEXAS,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

Before CLARK, Chief Judge, THORNBERRY, GEE, RUBIN, REAVLEY, POLITZ, RANDALL, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, HILL, and JONES, Circuit Judges.*

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with oral argument.

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* Judge Tate did not participate in the decision of this case.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that defendant-appellee pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

May 14, 1986

HIGGINBOTHAM, Circuit Judge, with whom CLARK, Chief Jugde, GEE, GARWOOD, JOLLY, DAVIS, and JONES, Circuit Judges, join dissenting.

ISSUED AS MANDATE: June 5, 1986.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION NO. 84-2181

RAYMOND WAYNE HILL,
Plaintiff

v.

THE CITY OF HOUSTON,
Defendant

(Filed July 25, 1986)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the City of Houston, Defendant in the above-referenced cause, hereby appeals to the Supreme Court of the United States from the En Banc opinion reversing the District Court and holding a municipal ordinance unconstitutional entered in this action on May 14, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 18th day of July, 1986, a true copy of the instrument to which this Certificate is attached was duly served upon each party to this cause by mailing or depositing same in a post office or official depository under the care and custody of the United States Postal Service, in a wrapper, properly addressed to the attorneys of record, postage prepaid, by certified mail, return receipt requested.

/s/ ROY F. MARTIN, III
Roy F. Martin, III

MOTION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
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No. 86-243

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,

Appellant,

versus

RAYMOND WAYNE HILL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM

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No. 86-243

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,

Appellant,

versus

RAYMOND WAYNE HILL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLEE'S MOTION TO AFFIRM

Appellee Raymond Wayne Hill moves pursuant to Rule 16.1(c) that the Court summarily affirm the judgment of the United States Court of Appeals for the Fifth Circuit in this cause on the grounds that the questions presented by the Jurisdictional Statement are so manifestly insubstantial as not to need further argument.

THE ORDINANCE

Since at least 1942[1/] the City of Houston and its police department have initiated arrests and criminal prosecutions

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1/ Although recodified in 1958 and again in 1968, the Ordinance has been in effect in its present form for at least 44 years. Sec. 34-11(a), Code of Ordinances, City of Houston, Texas (1968); Sec. 32-3, Code of Ordinances, City of Houston, Texas (1958); Sec. 1725, City Code of Houston, Texas (1942). See Appendix at page 26, infra.

under a municipal ordinance making it a misdemeanor, presently punishable by a fine of not more than $200.00 in one of the City's municipal courts, to assault, strike "or in any manner oppose, molest, abuse or interrupt" any police officer "in the execution of his duty." The City readily concedes that the Ordinance applies to words alone -- so-called "pure speech" -- unaccompanied by any actual or threatened physical misconduct.[2/] The City also acknowledges that "[o]n its face the ordinance can be applied to a wide variety of activities, some of which concededly cannot constitutionally be punished."[3/] Nevertheless, for at least 44 years, the Ordinance has been enforced as written. Its expansive and admittedly overbroad language has never been authoritatively construed, limited or clarified by any Houston municipal court Judge or by any Texas appellate court.

Significantly, the Ordinance is inapplicable to an immense range of disruptive speech and conduct that might otherwise be thought to come within its prohibition. This is because Section 1.08 of the Texas Penal Code provides that no municipality "may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty." This State-created preemption doctrine thus precludes enforcement of the Ordinance against assaultive or other physical or verbal misconduct that is also criminalized by State law. See, e.g., Texas Penal Code Sections 22.01 (Assault); 22.02 (Aggravated Assault, which includes threatening or causing bodily injury to a police officer); 22.03 (Deadly Assault on Law Enforcement or Corrections Officer or Court Participant); 22.07 (Terroristic Threat); 38.03 (Resisting Arrest or Search); 38.05 (Hindering Apprehension or Prosecution); 38.08 (Permitting or Facilitating Escape); 42.01 (Disorderly Conduct); 42.02 (Riot). For example, cursing, abusing or threatening a police officer -- or anyone else, for that matter -- is a species of disorderly conduct under Section 42.01 of the Texas Penal Code. Assaulting or striking a police officer (behavior that the literal language of the Ordinance appears to condemn) is actually punishable either as an assault or as an aggravated assault under Sections 22.01 and 22.02 of the Penal Code. As a matter of State law, none of such misconduct is punishable under the Ordinance.

Although in theory no speech or conduct criminalized by the State's criminal law is subject to prosecution under the Ordinance, that legal principle is frequently ignored in practice, because ordinarily the complaints initiating the prosecutions are prepared by the arresting officers themselves,[4/] who are provided with no training or instruction whatever either with respect to the Texas Penal Code's preemption doctrine or with respect to the type of conduct and speech that might be constitutionally punished as an "interruption." The complaints are not screened prior to filing by any City prosecutor or municipal court Judge (R. II, 157-58). Many, if not most, of those arrested and charged subsequently appear in municipal court without an attorney.

A representative sample of more than 200 complaints filed between October 1981 and March 1982 (four months before and one month after the arrest of Appellee Hill that triggered the filing of this action) reveals an extraordinarily diverse range of verbal and non-verbal activities that have resulted in arrests under the Ordinance: "refusing to move on"; "failure to remain silent and stationary"; "making false statements";

2/ In the District Court the City's chief municipal court prosecutor testified that in practice the Ordinance is applied indiscriminately to both verbal and non-verbal "interruptions" (R. II, 163). Two experienced Houston police officers testified that in enforcing the Ordinance they drew no distinction between conduct or threatened conduct and "pure speech" (R. III, 50-51; 80-81).

3/ Jurisdictional Statement at page 7.

4/ All cases are prosecuted on a printed, standard-form complaint containing blank spaces that are ordinarily filled in by the arresting officer in his or her own handwriting (R. II, 147; 156; P.X. 2, 3, 6, 7, 8, 9). All cases are prosecuted as "interruptions," rather than as alleged violations of the other operative words of the Ordinance.

"arguing"; "distracting an officer"; "delaying the issuance of a citation"; "verbal abuse"; "talking repeatedly (arguing)" and merely "talking," to name only a few.[5/] The scope of criminality is, literally, limited only by the imagination and creativity of the arresting officer who fills in the blank spaces of the complaint form.

A conviction under the Ordinance may be appealed to the County Criminal Court at Law of Harris County, Texas, but only "on the basis of errors that are set forth in the defendant's motion for new trial and are presented in the transcript and statement of facts [transcription of testimony] prepared from the municipal court of record proceedings leading to the conviction." Texas Government Code, Sec. 30.269(b). To perfect an appeal, the defendant must file a timely written motion for new trial within 10 days after his conviction; "a point of error not distinctly set forth in the motion is waived." Sec. 30.269(c). He must then give notice of appeal, Sec. 30.269(d), and, not later than 10 days after the motion for new trial is overruled, post an appeal bond in the amount of $50.00 or double the amount of fine and costs imposed, whichever is greater. Sec. 30.270(b).

A convicted defendant must then request the preparation of the transcript and statement of facts (assuming, of course, that either he or his retained defense counsel has been sufficiently diligent to request that the trial proceedings be transcribed by a court reporter) and file them with the Clerk of the municipal court within 60 days after giving notice of appeal. Sec. 30.273(a). He must then file a written appellate brief not later than 15 days after the filing of the record. Sec. 30.274(b).

If the fine imposed in the municipal court exceeds $100.00, a defendant may appeal the County Criminal Court at Law's affirmance of his conviction to one of the two State Courts of Appeals in Houston, Sec. 30.278, and he may thereafter seek

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5/ Among the more extraordinary arrests during this period was that of John G. Huatko, who was charged with "refusing to get off roof of burning apartments" (P.X. 10). The case was eventually dismissed.

discretionary review of any adverse decision in the Court of Criminal Appeals of Texas in Austin. Since 1976, when Houston municipal courts were made courts of record by the Texas Legislature, no person convicted under the Ordinance has ever successfully negotiated this route as far as the Court of Appeals nor, apparently, even as far as the County Criminal Court at Law.

Before 1976, appealing a conviction from the Houston municipal courts was considerably easier. They were not courts of record, and a defendant convicted following a jury or non-jury trial needed only to file a timely appeal bond to perfect an appeal to the County Criminal Court at Law, where he was entitled to a trial de novo on the municipal court complaint. Indeed, a defendant could plead guilty or nolo contendere, file his appeal bond and bypass the municipal courts altogether. However, in the event of conviction in the County Criminal Court at Law, he was entitled to appeal his conviction to the Court of Criminal Appeals of Texas only if the fine imposed exceeded $100.00.

Under the pre-1976 procedure no appeal to the Court of Criminal Appeals from a conviction under the Ordinance could reasonably have been anticipated unless, in a case involving a fine of more than $100.00 and less than $200.00, a convicted defendant had been stubborn enough, or foolhardy enough, or both, to retain an attorney to prosecute such an appeal. Of course, none was.

As the system has existed since 1976, an appeal to the County Criminal Court at Law or beyond is even less likely. Indeed, it is now a virtual impossibility. This is because a defendant not represented by counsel (which includes the vast majority of persons charged under the Ordinance) could never hope to clear the obvious procedural hurdles to a successful appeal to the County Criminal Court at Law, even if he or she were prepared to do so in order to challenge a fine

that can never exceed $200.00.

On the other hand, in virtually every one of these cases, any reasonably competent defense attorney can either bludgeon the prosecuting attorney or the municipal court Judge into dismissing the case on a legal technicality or insist on a trial, in which event the defendant is almost invariably found not guilty. In a substantial number of instances the cases are dismissed because the arresting officer does not even bother to show up for trial (R. II, 154, 162). Thus, the only people likely to be found guilty under this Ordinance are those least likely to appeal, i.e., those without lawyers. On the other hand, those with lawyers do not need to appeal if their cases are dismissed or they are found not guilty.

The end result is that in 44 years the Ordinance has never once been authoritatively construed, limited or clarified by any Texas appellate court, nor has any definitive construction ever resulted from any decisions of the Houston municipal court Judges themselves. Even if an individual had standing to initiate in the Texas courts a civil injunctive or declaratory judgment action to test the facial constitutionality of the Ordinance, neither the City nor the dissenting Judges in the Court of Appeals denies that such a suit would not be entertained. See, e.g., Dearing v. Wright, 653 S.W.2d 288 (Tex., 1983); Texas Liquor Control Board v. Canyon Creek Land Corporation, 456 S.W.2d 891, 894 (Tex., 1970); Crouch v. Craik, 369 S.W.2d 311, 315 (Tex., 1963). Until this case arose, the Ordinance was totally impervious to constitutional attack.

Houston appears to be the only one of approximately 1,145 incorporated municipalities in Texas that has enacted or that presently enforces an "interrupting" ordinance. Appellee's counsel thus far has not discovered any similar statute or municipal ordinance anywhere else in the country.

The City could, of course, easily and painlessly redraft and reenact the Ordinance to deflect the constitutional challenges presented in this case. It could direct its municipal court Judges to provide a definitive and authoritative construction of it to guide police officers, prosecutors, jurors and potential defendants. It could direct its police department to formulate policies governing the interpretation and enforcement of the Ordinance. It has done none of these things. Instead, as the majority of the Court of Appeals pointedly observed, "the City has stood its ground, kept the language intact, and fought this lawsuit for years." Hill v. City of Houston, Texas, 789 F.2d 1103, 1109 (5 Cir., 1986) (en banc).

STATEMENT OF THE CASE

Appellee Raymond Wayne Hill was arrested and jailed for alleged violation of the Ordinance in February, 1982, by Houston police officers J. L. Kelley and R. D. Holtsclaw, both of whom are white.[6/] Officer Kelley charged Appellee with "interrupting" by "verbal challenge" (P.X. 8) his investigation of Charles Hill, a black man unrelated to Appellee, who is white. According to Officer Kelley's testimony in the District Court,[7/] he had detained and was questioning Charles Hill shortly after midnight on a sidewalk in Houston's Montrose section when, from not less than seven or eight yards away (R. IV, 48), Appellee stated, "Leave him alone, he didn't do

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6/ Appellee has been arrested a total of four times under the Ordinance, the last time during the pendency of this action in the District Court. He was found not guilty in two cases, and two cases were dismissed. In these circumstances every Judge of the Court of Appeals -- and, by implication, the City in its Jurisdictional Statement -- has agreed that Appellee confronts a "credible threat" of future arrest and criminal prosecution under the Ordinance, both because of his "adopted role as citizen provocateur," 789 F.2d at 1107, and as the result of the four previous prosecutions. Ellis v. Dyson, 421 U.S. 426, 434 (1975); Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979); Kolender v. Lawson, 461 U.S. 352, 355, n. 3 (1983); cf. Wooley v. Maynard, 430 U.S. 705, 712 (1977).

7/ Officer Holtsclaw did not testify.

anything wrong" (R. IV, 45; 60); that shortly thereafter Appellee said, in a louder and more boisterous tone, "Leave him alone. Why don't you pick on somebody your own size?" (R. IV, 48), and that, when Officer Kelley turned, observed Appellee standing in the midst of a crowd of between 15 and 25 people and asked, "Are you interrupting me in my official capacity as a Houston police officer?" Appellee responded by putting his hands on his hips and saying, "Yes. Why don't you pick on somebody my size?" (R. IV, 48-49; 53). Officer Kelley characterized these words as "challenging me and baiting me into an arrest" (R. IV, 49). Appellee was immediately arrested, handcuffed and taken to jail (R. IV, 49). Charles Hill was released without being charged with any criminal offense (R. II, 67-68).

Predictably, Appellee's version of what happened was substantially different. He testified that both Officer Kelley and Officer Holtsclaw had surrounded Charles Hill, were waiving their flashlights in a threatening manner and were challenging him to fight, after misconstruing his behavioral peculiarities as ridicule of them when in fact his erratic bodily movements resulted from a medical condition (R. II, 65-66). Charles Hill's deposition testimony was that Officer Kelley's attitude was "aggresive" and that the officer was shouting at him when Appellee initially spoke (P.X. 13: 21, 37).

Officer Kelley admitted that Appellee was arrested only for what he said, not for any conduct or threatened conduct (R. IV, 60-63); that he did not regard Appellee's words as abusive (R. IV, 66); that, although a crowd had gathered near the scene, Appellee was not inciting a riot or encouraging anyone else to intervene (R. IV, 73), and that the crowd was not boisterous or disorderly, did nothing illegal and made no attempt whatever to protest or interfere with either the Charles Hill interrogation or with Appellee's arrest (R. IV, 53-54; 60-61).

The District Court's fact-findings (Jurisdictional Statement, B-1) make no reference whatever to the supposed "crowd." Officer Kelley admitted that he had made no mention of any "crowd" in his testimony 16 months previously at Appellee's trial in the Houston municipal court (R. IV, 53). Charles Hill's deposition testimony was that a total of five persons were on the scene: Charles Hill, Charles Hill's white female companion, Appellee and three other unidentified individuals (P.X. 13: 53).

Appellee was subsequently found not guilty of violating the Ordinance in a non-jury trial before one of the Houston municipal courts in April, 1982, whereupon he instituted this action in the District Court under 42 U.S.C. section 1983 against the City and the two arresting officers, alleging in substance that the words "in any manner oppose, molest, abuse or interrupt" in the Ordinance were on their face unconstitutionally vague and overbroad and, in view of their conceded applicability to "pure speech," violative of the First and Fourteenth Amendments. He also alleged that the Ordinance had been unconstitutionally applied, in violation of the First Amendment, to the "pure speech" that prompted his arrest and criminal prosecution. He sought declaratory and injunctive relief against further enforcement of the Ordinance, actual and exemplary damages, expunction of the records of his arrest and criminal prosecution under Art. 55.01 of the Texas Code of Criminal Procedure, court costs and reasonable attorney's fees under 42 U.S.C. section 1988 (R. 1, 137).

The case was tried before the District Court without a jury in August, 1983, after the two individual police officers had been dismissed as defendants by agreement of the parties. Thereafter, in February, 1984, the District Court entered Findings of Fact and Conclusions of Law (Jurisdictional Statement, B-1), upholding the legality of Appellee's arrest and criminal prosecution and rejecting each of the Federal constitutional claims asserted.

On appeal a panel of the Fifth Circuit reversed, one Judge dissenting. Hill v. City of Houston, Texas, 764 F.2d 1156 (5 Cir., 1985). After concluding that the totality of the circumstances in the case (including the four previous arrests, prosecutions and acquittals or dismissals under the Ordinance) conferred Article III standing on Appellee to institute a First Amendment attack on the facial constitutionality of the law, the panel held the challenged language to be substantially overbroad on its face and therefore unconstitutional under the First Amendment. Having so held, the panel did not reach either the issue of facial vagueness or the "as applied" contention. 764 F.2d at 1161.

On rehearing en banc, the Court of Appeals again struck the Ordinance's language for substantial, unconstitutional overbreadth on its face. Hill v. City of Houston, Texas, 789 F.2d 1103 (5 Cir., 1986). The dissenting Judges frankly conceded that "the Houston ordinance is undeniably susceptible to applications that would impermissibly regulate or proscribe protected speech." 789 F.2d at 1122. Nevertheless, they concluded that the Ordinance is not substantially overbroad in the sense demanded by Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973), both because of their conviction that the Ordinance is susceptible to hypothetical (although unrealized) State court constructions that might limit it to narrower dimensions, 789 F.2d at 1124, and because of their belief that "the potential reach of the ordinance does not seriously and manifestly threaten the constitutionally protected conduct of anyone; certainly it does not present so grave a threat that we must strike it down as substantially overbroad." 789 F.2d at 1126 (emphasis in original).

8/ The majority of the en banc Court of Appeals did not address Appellee's facial vagueness claim. Apparently all members of the Court rejected his "as applied" contention, presumably on the basis of the District Court's fact-findings. See, e.g., 789 F.2d at 1113 ("Hill has failed to show that he sustained any actual damages as the result of his arrest"; 789 F.2d at 1114 (dissenting opinion) ("This court is unanimous in rejecting [Appellee's] contention that the ordinance was unconstitutionally applied in the actual case presented.

The dissenters thus would have sustained the facial constitutionality of the Ordinance against Appellee's vagueness and overbreadth claims, affirmed the District Court's decision to that effect and permitted the City to continue to enforce the Ordinance as written. On the other hand, not one of the 15 Judges of the en banc Court of Appeals seriously entertained, or even bothered to advert to, the City's astonishing request, advanced for the first time more than 39 months into the litigation in its Petition for Rehearing and Suggestion for Rehearing En Banc, after it had lost the case on the merits before the panel, that the Court abstain from deciding the vagueness-overbreadth claims pending some supposed "limiting State court construction" of the Ordinance. If accepted such a proposal would, of course, have dictated the remand and dismissal of the litigation, not a determination on the merits. Harrison v. NAACP, 360 U.S. 167, 177 (1959).

These circumstances are of crucial, and indeed dispositive, significance. None of the three "Questions Presented" in the City's Jurisdictional Statement before this Court attacks, either directly or by implication, the single ground supporting the judgment of the Court of Appeals, i.e., that the Ordinance is substantially overbroad on its face and is therefore unconstitutional under the First Amendment. The City does not only not challenge that holding; it effectively concedes it (Jurisdictional Statement, page 7). That this concession occurred only after the City expressly agreed to submit the alleged overbreadth of the Ordinance to definitive resolution by the Federal Courts, and lost, is virtually conclusive of the case. Having lost on the merits before the Court of Appeals, the City now persists in manipulating Federalism and comity as pawns in an unprecedented display of procedural gamesmanship.

For the following reasons, the City of Houston is wasting this Court's time.

ARGUMENT

1. The City waived any entitlement to invoke the abstention doctrine, or to rely on the possibility of some hypothesized limiting State court construction of the Ordinance, by failing to raise these issues until after the adverse decision on the merits by a panel of the Court of Appeals.

Appellee's original complaint in this cause was filed in the District Court in April, 1982 (R. I, 138). Thirty-eight and one-half months later, in July, 1985, a panel of the Court of Appeals held the Ordinance to be substantially overbroad and therefore unconstitutional under the First and Fourteenth Amendments. Hill v. City of Houston, Texas, 764 F.2d 1156 (5 Cir., 1985). Up to that point the City had never once contended, directly or indirectly, expressly or by implication, that the Federal Courts should defer adjudicating the facial constitutionality of the Ordinance pending some future hypothetical limiting State court construction of it. On the contrary, the City took precisely the opposite position until it lost the case on the merits before the panel.

The City's original answer in the District Court makes no reference whatever to any supposed grounds for abstention. Instead, it admits "the Court has jurisdiction of the plaintiff's federal claims against [the City]" and maintains that the Ordinance "is constitutional" (R. I, 125, 127-28). The joint pretrial order required by the local rules of the District Court (R. I, 83), drafted by the City, signed by counsel for both parties and specifically and comprehensively delineating the issues to be resolved at trial, contains no reference to abstention or any other hint that the City desired postponement of the exercise of Federal jurisdiction pending further State court consideration of the Ordinance. On the contrary, the City's proposed findings of fact and conclusions of law that it submitted to the District Court following the trial maintain that the Ordinance is neither facially vague nor facially overbroad under the First Amendment and ask that the District Court so hold (R. I: 33; 43-48).

As a result of the City's consistent position, the District Court's decision on the merits does not mention abstention even in passing (Jurisdictional Statement, B-1). In its brief and oral argument before the panel of the Court of Appeals the City never suggested the propriety of abstention but instead asked for a decision on the merits affirming the constitutionality of the Ordinance. In short, from all that appeared from any written or spoken manifestation of its position during the more than three years that preceded the panel opinion, the City was perfectly content to have these constitutional claims resolved by the Federal Courts.

With the publication of the panel and dissenting opinions in the Court of Appeals, the City's view of the case underwent an astounding metamorphosis. An Ordinance that before the panel opinion "could and should not be more definite" and that was justifiably "a little imprecise . . . to embrace all of its legitimately intended objectives" (Brief for City of Houston at page 13) suddenly evidenced "a sufficient degree of ambiguity" to warrant abstention (City of Houston's Suggestion for Rehearing En Banc at page 10). An Ordinance that previously did not "reach more broadly than is reasonably necessary to protect legitimate governmental interests" (Brief for City of Houston at page 16) now demanded "a limiting construction" in order to "pass constitutional muster" (City of Houston's Suggestion for Rehearing En Banc at page 9). In short, an appeal that before the panel opinion warranted the resolution of the merits of the Federal constitutional claims so long as the outcome was potentially favorable to the City was transmogrified upon the appearance of that opinion into an appeal requiring remand and dismissal, not because the Ordinance is facially constitutional -- the City now impliedly concedes that it is not by pleading for yet more time to await some supposed limiting State court construction -- but because after 44 years the municipal courts of Houston and the appellate courts

of Texas still have supposedly not been provided with a "fair" opportunity to limit the Ordinance to constitutional proportions, an objective that presumably will be accomplished at some unspecified time within the next 44 years if the City has its way.

This sort of free-wheeling and irresponsible advocacy eventually will give Federalism a bad name. The abstention doctrine simply does not permit the City to veto an adverse decision on the merits after having voluntarily accepted Federal jurisdiction in this case for more than three years. "If the State [or a municipality] voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480 (1977). Any contrary view would encourage municipalities to squander the valuable time of the District Courts, the Courts of Appeals and this Court in considering the merits of Federal constitutional claims they secretly intend to submit only for favorable, not adverse, adjudication.

This Court has repeatedly adhered to the rule that only in the most exceptional cases will it consider questions not timely presented to and passed upon by the Court of Appeals. E.g., Duignan v. United States, 274 U.S. 195, 200 (1927). The abstention claims the City now belatedly presses on this Court were not considered, ruled on or even adverted to by even one of the 15 Judges of the Court of Appeals because of their obvious untimeliness. In a variety of other contexts this Court has consistently regarded such procedural defaults as determinative, whether by private counsel, e.g., Murray v. Carrier, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 397 (1986) (defense counsel's failure to raise due process claim on appeal from State conviction constituted unexcused procedural default barring Federal habeas corpus review), or counsel for the Government, e.g., Steagald v. United States, 451 U.S. 204, 211 (1981) (Government counsel

lost right to challenge accused's standing "through [their] assertions, concessions and acquiescence"). 9/ Unless attorneys for municipalities are entitled to some sort of special dispensation for strategic dilatoriness, this case is obviously controlled by the same principle. 10/

9/ In an equivalent procedural context the Court has characterized this sort of tactical maneuver in an adversary proceeding as "sandbagging." Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

10/ Of course, abstention is an equitable doctrine and in a proper case may be invoked by the Court sua sponte, whether or not a party to the litigation has laid timely claim to it. Bellotti v. Baird, 428 U.S. 132, 143, n. 10 (1976). Self-evidently this is not an instance in which such spontaneity is either necessary or appropriate. Baggett v. Bullitt, 377 U.S. 360, 378-79 (1964).

2. The Ordinance is both unconstitutionally vague and substantially overbroad on its face because it fails to provide fair notice of what words or conduct will fall within its prohibition, because it confers virtually unrestrained authority on the arresting officer to make that determination and because it plainly criminalizes a substantial amount of speech and conduct indisputably protected under the First and Fourteenth Amendments to the Constitution of the United States. 11/

The Ordinance in this case is the generic equivalent of the one struck down on its face by the Court in Lewis v. City of New Orleans, 415 U.S. 130 (1974), which attempted to make it unlawful and a breach of the peace for any person "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." Justice Powell's concurring opinion isolated the problem with such an ordinance, in terms equally applicable to this case:

> "This ordinance . . . confers on police a virtually unrestrained power to arrest and charge persons with a violation. Many arrests are made in 'one-on-one' situations where the only witnesses are the arresting officer and the person charged. All that is required for conviction is that the court accept the testimony of the officer that obscene or opprobrious language has been used toward him while in the performance of his duties. Indeed, the language need not be addressed directly to the officer since the ordinance is violated even if the objectionable language is used only 'with reference to any member of the city police.' . . . The present type of ordinance tends to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident." 415 U.S. at 135-36.

This is, in short, what the amicus curiae in the Court of Appeals astutely characterized as a "dragnet law" -- a misdemeanor carrying a relatively minor penalty, deliberately

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11/ Although the Court of Appeals invalidated the Ordinance only on grounds of substantial overbreadth, and did not reach or decide the facial vagueness claim, Appellee is nonetheless entitled to assert both vagueness and overbreadth in support of the judgment below, having consistently advanced and relied upon both grounds throughout this litigation. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. ___, 104 S.Ct. ___, 81 L.Ed.2d 694, 702, n. 7 (1984); Thigpen v. Roberts, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 23, 28 (1984); Washington v. Yakima Indian Nation, 439 U.S. 463, 476, n. 20 (1979).

designed to give local police virtually unlimited discretion to make arrests for speech or conduct that the more precisely drafted provisions of a State's penal code would not condemn. It is not simply that such laws are vague, indefinite and overbroad on their face; it is that they are meant to be so -- indeed, must be so if they are effectively to accomplish their intended purpose. As Justice Frankfurter once remarked of such laws,

> "These statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these [laws] are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." Winters v. New York, 333 U.S. 507, 540 (1948) (dissenting opinion).

Both the City and the dissenting Judges in the Court of Appeals appear totally oblivious to the fact that from Coates v. City of Cincinnati, 402 U.S. 611 (1971) onward, this Court has never once sustained the facial constitutionality of a "dragnet law" against First Amendment or due process claims where the law had not previously been limited to constitutional proportions by an authoritative State court construction. On the contrary, since that time the Court has repeatedly struck down such laws on their face, for vagueness, overbreadth, or both. See., e.g., Kolender v. Lawson, 461 U.S. 352 (1983) ("credible and reliable identification"); Lewis v. City of New Orleans, 415 U.S. 130 (1974) ("obscene or opprobrious language"); Plummer v. City of Columbus, 414 U.S. 2 (1973) ("menacing, insulting, slanderous or profane language"); Cason v. City of Columbus, 409 U.S. 1053 (1972) (same); Gooding v. Wilson, 405 U.S. 518 (1972) ("opprobrious words or abusive language, tending to cause a breach of the peace"); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (common vagrancy ordinance); Coates v. City of Cincinnati, 402 U.S. 611 (1971) (gatherings of three or more "annoying to

persons passing by"); cf. Palmer v. City of Euclid, 402 U.S. 544 (1971) (being out at night "without visible or lawful business"; unconstitutional as applied to sitting in a parked car). In two other such cases the judgments of State courts were vacated and the case remanded to the State court for reconsideration in ligh of Gooding v. Wilson, supra. In each instance, the State court reversed the conviction and directed dismissal of the prosecution. Rosenfeld v. New Jersey, 408 U.S. 901 (1972) ("loud and offensive or profane or indecent language"), on remand, State v. Rosenfeld, 295 A.2d 1 (Sup.Ct. N.J., App. Div., 1972); Brown v. Oklahoma, 408 U.S. 914 (1972) ("any obscene or lascivious language or word" in public "or in the presence of females"), on remand, 503 P.2d 571 (Okla.Cr.App., 1972).[12/]

In at least two significant respects the Ordinance in this case is even more flagrantly unconstitutional on its face than any "dragnet law" the Court has ever previously confronted. First, "interruptions" subject to arrest and criminal prosecution are not limited to threatened breaches of the peace (and certainly not to imminently threatened breaches), nor to abusive language alone. Instead, the

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12/ In Colten v. Kentucky, 407 U.S. 104 (1972) the Court sustained against facial vagueness and overbreadth claims a State disorderly conduct statute that on its face criminalized "[congregating] with other persons in a public place and [refusing] to comply with a lawful order of the police to disperse" if undertaken "with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof."

In Colten, however, the Kentucky court had authoritatively construed the statute as limited to situations in which there was no bona fide intention to exercise a constitutional right -- "in which event, by definition, the statute infringes no protected speech or conduct" -- or in which the individual interest in engaging in particular speech or conduct was, in light of all the surrounding circumstances, plainly insubstantial ("miniscule") compared to the public interest in suppressing the speech or conduct. Neither the Houston municipal courts nor the Texas appellate courts has engrafted any similar qualification on the Ordinance involved here. More importantly, the District Court in this case expressly found as a fact that "[e]ach time he was arrested, [Appellee] felt or believed he was not in violation of the ordinance . . ." (Jurisdictional Statement at page B-9).

Ordinance, both on its face and as traditionally applied in practice, extends to any conduct, speech or activity that the arresting officer deems to be disruptive, distracting, offensive or otherwise inappropriate. There is simply no discernible restriction placed by the Ordinance on the arresting officer's discretion. In a quite literal sense Houston has "entrusted [law-making] to the moment-to-moment judgment of the policeman on his beat." Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (concurring opinion of Justice Black).[13/]

Secondly, and most significantly, this is clearly not an instance in which "the legitimate reach [of the Ordinance] dwarfs its arguably impermissible applications." New York v. Ferber, 458 U.S. 747, 773 (1982). As previously noted (pp. 2-3 of this Motion to Affirm), Texas law precludes application of the Ordinance to any speech or conduct already condemned by any provision of the Texas Penal Code. Thus, as a matter of State law, the Ordinance simply does not extend to that wide variety of disruptive speech or behavior that might be deemed a constitutionally punishable "interruption." Instead, the Ordinance can be applied only to conduct or speech that is not otherwise unlawful outside the corporate limits of the City of Houston and that the people of Texas, through their Legislature's enactment of a comprehensive Penal Code of State-wide application, have not otherwise sought to condemn. In these circumstances it is virtually impossible to discern any "central core of constitutionally regulable conduct [or speech]; the entire scope of the [Ordinance is] subject to the uncertainties and vagaries of prosecutorial

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13/ Both the City and the dissenting opinion below have totally missed the point of the representative sample of prosecutions offered in evidence by Appellee (P.X. 10) and extensively relied upon by the Court of Appeals majority. The issue is not whether one or more of those prosecutions was proven to be unconstitutional. The issue is whether such sample demonstrates a pervasive and arbitrary pattern of enforcement of the Ordinance against words alone, unaccompanied by an allegation of actual or threatened conduct. Obviously it does.

discretion." New York v. Ferber, 458 U.S. at 771, n. 26.

Indeed, this is an Ordinance whose application in practice simply defies analysis in accordance with the traditional standard prescribed by Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973), i.e., whether the overbreadth is "not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep" (emphasis added). No-one can rationally determine the "plainly legitimate sweep" of an Ordinance whose substantive content is incomprehensible and whose contours are defined by speech or conduct that is not otherwise criminally punishable under State law. What words, uttered in what circumstances, with what real or ostensible motive, justification or excuse, may constitutionally be punished under this Ordinance? Even assuming that its "plainly legitimate sweep" is somehow recognizable by a lawyer, a Judge or a Supreme Court Justice, could it rationally be argued that the average Houston police officer will invariably, or even usually, confine his or her arrests under the Ordinance to conduct or speech that is constitutionally unprotected? The answer is, or ought to be, self-evident.[14/]

This Court has repeatedly struck down as facially unconstitutional for vagueness or substantial overbreadth State laws no more indefinite and open-ended than this one. E.g., Keyishian v. Board of Regents, 385 U.S. 589 (1967) ("treasonous" or "seditious" utterances); Dombrowski v. Pfister, 380 U.S. 479 (1965) ("subversive organization"); Cox v. Louisiana, 379 U.S. 536 (1965) (failing or refusing to disperse

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14/ "[The Ordinance] does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such [an ordinance], which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940).

when ordered to do so by police). When invalidating such laws the Court has done little more than "determine [that] the enactment reaches a substantial amount of constitutionally protected conduct," Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982), judged in relation to the long-established proposition that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech." Smith v. California, 361 U.S. 147, 151 (1959); Hynes v. Mayor and Council of the Borough of Oradell, 425 U.S. 610, 620 (1976). "In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis." Village of Hoffman Estates, supra, 455 U.S. at 494, n. 6; cf. Kolender v. Lawson, 461 U.S. 352, 358, n. 8 (1983) (Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines"); Cox v. Louisiana, 379 U.S. at 551 (statute "unconstitutionally vague in its overly broad scope").

Viewed in relation to these cases, the position of the dissenting Judges in the Court of Appeals is incomprehensible. This Ordinance is either "substantially overbroad" on its face in the Ferber-Broadrick-Dombrowski sense, or it is not. If it is not -- that is, if it does not reach a substantial amount of constitutionally protected speech or conduct -- then it is not unconstitutional on its face and may be enforced as written, whether or not the State courts eventually clarify its potential applicability to marginal situations. A "limiting construction" is simply not required (and may not even be necessarily desirable) if a statute is not "substantially overbroad" under Ferber-Broadrick-Dombrowski.

On the other hand, if the Ordinance is "substantially overbroad" or vague in a First Amendment sense, then the mere possibility that a State court might eventually delineate the

outer limits of its reach through a process of serialized adjudications in individual criminal prosecutions is totally irrelevant. "If the rule were otherwise, the contours of regulation would have to be hammered out case by case -- and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." Dombrowski v. Pfister, 380 U.S. 479, 487 (1965). Here, as in Dombrowski, "no readily apparent construction suggests itself as a vehicle for rehabilitating the [Ordinance] in a single prosecution." Id. at 491. But even if such a limiting construction were apparent, the Ordinance is nevertheless unconstitutional on its face until and unless a State court authoritatively adopts it:

> "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. [Citing Dombrowski] The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights."

Coates v. City of Cincinnati, 402 U.S. 611, 619-20 (1971) (dissenting opinion by Justice White).

The dissenting opinion in the Court of Appeals distorts established First Amendment vagueness-overbreadth doctrine by incorrectly assuming that the mere hypothetical possibility that the open-ended terms of the Ordinance might eventually be limited by some authoritative State court construction is sufficient justification, in and of itself, for concluding that it is not "substantially" overbroad because, if such a limiting construction ultimately were adopted, the Ordinance then would not be overbroad at all. Even though there has been no such limiting construction proferred by any Houston municipal court Judge or by any Texas appellate court during the 44 years the Ordinance has been enforced, the dissent nevertheless views it

as inevitable and awaits its coming with equanimity.

The point is simply this: if the Ordinance is neither vague on its face nor substantially overbroad, then it needs no limiting construction at all. To say that a law is not unconstitutionally vague or overbroad because it could be clarified or limited by a future State court decision is actually equivalent to an implied (perhaps unwitting) concession that the Ordinance needs to be limited.

Moreover, the dissent's view of this Ordinance as merely a content-neutral "time, place and manner" regulation, 789 F.2d at 1119, "inhibitory and noncensorial in operation," 789 F.2d at 1126, is obviously mistaken. On the contrary, the Ordinance is plainly "open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place and manner regulation because [discretion vested in some governmental authority] has the potential for becoming a means of suppressing a particular point of view." Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981).

Finally, the extent to which the dissenting opinion below misperceives the issues presented by this case is vividly reflected in its ultimate reasons for rejecting the claims of facial unconstitutionality:

> "It is apparent that the Houston ordinance has three related cardinal qualities that support its validity. First, it defines a central core of indisputably regulable conduct. Second, its central focus is not on speech but on conduct -- 'assault, strike . . . molest . . . abuse.' Third, the ordinance forbids constitutionally unprotected results and does not purport to reach the proscribed evil -- disruption of law enforcement -- at an incipient level." 789 F.2d at 1126-27.

First, the supposed "central core of indisputably regulable conduct" under the Ordinance undergoes a terminal melt-down if only one recognises, as the dissent never did, that speech or conduct punishable under the Texas Penal Code (assaults, abusive language and the like) are simply not punishable at all under the Ordinance. Second, it defies reality to maintain

that the Ordinance's "central focus" is not on speech but on "conduct" when the vast majority of arrests and prosecutions for non-assaultive conduct under the Ordinance results either from the speaking of words alone, unaccompanied by any actual or threatened physical misconduct, or from the purely passive occurrence of failing or refusing to obey an instruction, request or order of a police officer, no matter how arbitrary or unreasonable it may be. Third, the assertion that the Ordinance does not prohibit disruption of law enforcement functions "at an incipient level" should be juxtaposed against the fact that "talking" in the presence of a Houston police officer has been charged as an "interruption" under the Ordinance -- not shouting, cursing, screaming, threatening, intimidating or arguing -- merely "talking." One simply cannot get much more "incipient" than that.

The obvious and inescapable fact is that all of this Court's decisions under the Ferber-Broadrick-Dombrowski doctrine demand that this Ordinance be struck down on its face as both unconstitutionally vague and substantially overbroad under the First Amendment. No decision counsels leaving the Ordinance intact and abdicating constitutional responsibility to a municipality that for 44 years has tolerated people being arrested and criminally prosecuted for "talking" to a police officer.[15/]

15/ The City's citations in its Jurisdictional Statement of Brockett v. Spokane Arcades, Inc., 472 U.S. ___, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985) and United States v. Grace, 461 U.S. 171 (1983) are far wide of the mark. Brockett effectively sustained in part a preenforcement attack on the facial constitutionality of the recently enacted Washington obscenity statute by striking down the word "lust" as "taken to include normal interest in sex." 86 L.Ed.2d at 406. The Court found the law otherwise susceptible to an obvious limiting construction that was to be readily anticipated, thereby eliminating any realistic concern "that an attack on the statute will be unduly delayed or protected speech discouraged." 86 L.Ed.2d at 406.

In Grace the Court simply construed a Federal statute to exclude from its ambit constitutionally unassailable activities -- picketing and leafletting on the sidewalks surrounding the Supreme Court building -- leaving the remainder of the law, in view of such interpretation, at least arguably constitutional.

This Ordinance is a legal dinosaur, a throw-back to bygone days when individual rights of free expression under the First Amendment were almost invariably subordinated to the supposed exigencies of law enforcement and when loose, open-ended language was deemed essential to confer a roving commission on police officers to arrest whomever they considered inimical to the public welfare. Those days are gone forever. They should not and must not be permitted to return.

CONCLUSION

For the foregoing reasons, Appellee Raymond Wayne Hill moves that the judgment of the United States Court of Appeals for the Fifth Circuit in this cause be summarily affirmed.

Respectfully submitted,

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Raymond Wayne Hill

August 1986

APPENDIX

Sec. 34-11(a), Code of Ordinances, City of Houston, Texas (1968), recodified by Ord. 85-1380, August 21, 1985:

"Sec. 34-11. Assaulting or interfering with policemen.

(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."

Sec. 32-3, Code of Ordinances, City of Houston, Texas (1958):

"Sec. 32-3. Same -- Assaulting or interfering with policemen.

It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any officer of the city, or any policeman, in the execution of his duty, or any person summoned to aid in making an arrest."

Sec. 1725, City Code of Houston, Texas (1942):

"Sec. 1725. Resisting or interfering with officer, etc. Any person who assaults, strikes or in any manner opposes, molests, abuses or interrupts any officer of the city, or any policeman, in the execution of his duty, or any person summoned to aid in making an arrest, shall be fined not less than twenty-five nor more than five hundred dollars."

JOINT

APPENDIX

Supreme Court, U.S.
FILED
NOV 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Appeal Docketed — August 12, 1986

Probable Jurisdiction Noted — October 6, 1986

83PP

NO. 86-243

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

JOINT APPENDIX

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Code of Ordinances of the City of Houston (1968) § 34-11(a) (recodified Ordinance No. 85-1380)

"§ 34.11. *Assaulting or interfering with policemen.*

(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."

COMPLAINT: INTERRUPTING A POLICEMAN
City Code Sec. 34-11 Penalty: Not To Exceed $200.00

In the Name and by Authority of the State of Texas:

I, the undersigned affiant, do solemnly swear that I have good reason to believe, and do believe that RAYMOND WAYNE HILL on or about the 14TH day of FEBRUARY, 19 82, and before the making and filing of this complaint, within the incorporated limits of the City of Houston, in the County of Harris, and State of Texas, did then and there wilfully or intentionally interrupt a city policeman, to-wit J I KELLEY while said policeman was in the execution of his duty, in the 500 block of WESTHEIMER Street, by VERBAL CHALLENGE during an investigation being conducted by said policeman.

Against the peace and dignity of the State

Affiant

Subscribed and sworn to before me by the this 14 day of FEBRUARY, 1982

Notary Public, Houston, Harris County, Texas

CITY OF HOUSTON
COUNTY OF HARRIS
STATE OF TEXAS

I, A. A. JONES, Chief Clerk of the City of Houston, Municipal Courts, do hereby certify that the foregoing is a true and correct copy of the original record now in my lawful custody and possession, as keeper of the records of said Court.

Witness my official signature and seal of office this

A. A. JONES, Chief Clerk
City of Houston
Municipal Courts
By

10 13 10

UNK	W	M
Social Sec. No.	Race	Sex
RAYMOND WAYNE HILL		41
Name		Age
420 WESTHEIMER #9		
Address		
500 WESTHEIMER		12:14 hrs
Place of Arrest		Time
SAME		
Arresting Officers		Badge No.
GOLD - HOUS. MEDIA TX		#95 3275

JUDGMENT RECORD—COURT MINUTES

IN CAUSE NO. [redacted]

THE STATE OF TEXAS

vs.

Date 4-16-82

This day this cause was called for trial, and both parties appeared, announced ready for trial, and the defendant pleaded NOT guilty ____ to the accusation in the complaint and waived ____ a trial by jury, and the court ____ having heard the evidence is of the opinion that the defendant is ____ guilty as charged. It is therefore ordered, adjudged and decreed that the State of Texas, for the use and benefit of the City of Houston, Texas, do have and recover of the defendant the sum of $ [redacted], for which execution will issue, and in default of payment, that the defendant be committed to jail until said fine is paid.

M Green
Judge, Municipal Court, Houston, Texas

Court Reporter (was) (was not)
Atty (was) (was not)
Def. (was) (was not)
Non Jury

IN MUNICIPAL COURT
CITY OF HOUSTON
HARRIS COUNTY, TEXAS

CAUSE NO. [redacted]

COMPLAINT

THE STATE OF TEXAS

vs.

[redacted]

Arrest No. 4-54456

Filed the 14th day of April, 1982

Marilyn Decker
Deputy Clerk, Municipal Court

WITNESSES:

DISPOSED OF

Attorney

Address

Amt. Bond Date Set Hour Court No.

Receipt No. Initials

INTERRUPTING A POLICEMAN

[52]

* * *

RAYMOND WAYNE HILL

The witness, called as a witness in his own behalf, after having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. MANESS:

Q. Would you state your name, please?
A. Raymond Wayne Hill.
Q. How old a man are you, Mr. Hill?

[53]

A. I am forty-two.
Q. And do you reside here in the Houston, Harris County, Texas area?
A. I do.
Q. Specifically, what part?
A. 1424 Marshall Street, which is in Montrose.
Q. What is your occupation or profession at the present time?
A. I am a paralegal for the law firm of Hopkins, Lowe and Young, and I am executive director of Houston Human Rights League. Both jobs are part time.

THE COURT: I'm sorry; you are a paralegal and what else?

THE WITNESS: I am paralegal for the firm of Hopkins, Lowe and Young and executive director of Houston Human Rights League.

Q. (By Mr. Maness) How long have you resided in the Houston area?
A. I was born in Houston.
Q. Did you grow up here?
A. Yes, sir.
Q. Graduate from high school?
A. Yes, sir.
Q. What happened to you then?
A. I graduated from Galena Park High School, attended college

[54]

at Stephen F. Austin in Nacogdoches, attended some graduate level studies at Tulane University, attended the University of Indiana, sex research institute; I studied for a while at the University of Houston and worked for a while in the mortgage banking industry, just before and just after Carla and there was a lot of cleaning up to do, and I became an employee for Mainland Mortgage Company.

I helped found Gay Political Caucus. Radio station KPFT in Houston, I was instrumental in that. In 1970 I was convicted of several offenses of burglary and went in Texas Department of Corrections until March of 1975.

Q. Excuse me. You mentioned the Gay Political Caucus. Are you a homosexual?
A. Yes, I am.
Q. How long have you been a homosexual?
A. I have been openly gay since I was seventeen years old.
Q. For the Record, will you please tell the Court what is the Gay Political Caucus?
A. Gay Political Caucus is an organization I cofounded in June of 1975 which combines the political strength

of gay men and lesbians and their families and supporters for political benefits. The largest bloc vote in Harris County, the largest political mailing list in Harris County, and is right now recognized to be the most effective political organization in this county, and certainly the most effective

[55]

gay political organization in the United States.

THE COURT: Well, plaudits notwithstanding, I think many political organizations claim they are the biggest and most effective.

THE WITNESS: We are the largest mailing list, Your Honor.

THE COURT: And many claim that, also. But anyway, you have this organization that you are active with, whether you're the largest or not?

THE WITNESS: Currently a member of the Board of Gay Political Caucus. I have been with the organization and active member since its founding.

THE COURT: All right.

Q. (By Mr. Maness) You mentioned KPFT radio. Is that a regular or ordinary radio station?

A. I think all radio stations ought to be like KPFT. It is—we broadcast in, I believe, nine languages at present. While I was managing the radio station, we broadcast in eleven languages. We do community service broadcasting with special programs from twelve elements of Houston's diverse community. We broadcast twenty-two different kinds of music, most of that—

THE COURT: Excuse me, but what's the relevance of all this?

MR. MANESS: Your Honor, I would like to show, for

[56]

the Record, the type of person that Mr. Hill is, his political affiliations and his interests, his background. Because we think they bear directly on what may presumably be an issue in this suit, which is probability of future arrests under this ordinance.

THE COURT: Well, let's get into the facts of this case when he was arrested for this, violating this ordinance. We'll go into that. I think you have got enough background in here.

Q. (By Mr. Maness) Mr. Hill, how many times have you been arrested under section 3411-A of the Houston City Ordinance?

A. Four times.

Q. When was the first time, approximately?

A. It was the fall of 1975. Exact date, I don't know.

Q. Tell the Court basically what happened.

A. There had been considerable harassment in an area known as the Circuit in Montrose, about incidents of police brutalizing civilians; I'm talking about an inordinate number of arrests for people using sidewalks—

MR. CRAWFORD: Excuse me, Your Honor. I will object to the—

THE COURT: Well, you will spend more time objecting. I won't consider the irrelevant matters.

MR. CRAWFORD: Yes, Your Honor.

THE COURT: Go ahead.

[57]

A. Thank you, sir. So I had guests from out of town, I was entertaining them, and someone came up to me in a restaurant and said, they are really heavy over on Hawthorne Street. So I left my guests and went to Hawthorne Street to see what was going on, and police officers had stopped a car and was issuing it a citation. I pulled a pad out of my pocket and wrote down the license number of the car that was stopped. I was on the sidewalk; I had left my car and was standing on the sidewalk some three car lengths from the scene. I wrote down the license number of the car that was stopped and the number off the back of the squad car and turned around and started to go to my car.

Q. (By Mr. Maness) Why did you do that? Why did you write down the license number and number of the police car?

A. Well, I wanted to be able to get in touch with the person stopped to get their version of why they were stopped and what they were cited for at a later time.

Q. Were you working for KPFT at this time?

A. Well, I was doing a program on KPFT, yes.

Q. Okay.

A. I had a press pass on me. I started back to my car and the officer stopped me and said, let me see what you have got there.

Q. Do you recall the identity of this police officer?

A. No, I don't remember his name. I was subsequently

[58]

arrested by his sergeant, though he was the person that was on the complaint. It was Officer Longstaff or Longview or something; Long something.

Q. What happened when the officer asked to see what you had written down?

A. He grabbed at the piece of paper. I showed him, and he tore it up and threw it down and said, you are under arrest.

Q. Did he tell you why?

A. No, sir.

Q. What happened?

A. I suggested that I had not violated any laws; I suggested that he call his sergeant, which he did.

Q. What happened then?

A. Sergeant Sandy Billstein came to the scene and proceeded to try to explain to me that residents in the area, of which I was one, had more right to access to the sidewalks and the street than faggots, had no constitutional rights to use the streets or even be in the neighborhood or be in Houston, and I told him that I didn't wish to discuss constitutional law with an angry police officer on the street corner and asked him either to arrest me and carry me to jail or cut me loose, and he arrested me.

Q. What happened to that case?

A. We went to Court in Judge Youngman's Court. We heard

[59]

evidence in that case and the case was—Judge Youngman, tried before the Judge, found me not guilty. And I subsequently sued in Federal District Court in a case styled Hill, et al versus Billstein, et al.

Q. And what was the disposition of that case?

A. On our own motion to dismiss with prejudice against the City, we removed the case from the Court for three years later, because we could never get any docket and the Judge in the case—

THE COURT: I'm sorry. You did what?

THE WITNESS: We couldn't get on a docket, couldn't persuade the Judge to move it, it was just haressment. It had become a harassment, at that point.

THE COURT: You filed suit in Federal Court?

THE WITNESS: Yes, sir.

THE COURT: And you couldn't get the case tried? Is that your problem?

THE WITNESS: Well, three years later, my attorney at that time was Patrick Wiseman, who by that time had become general counsel for ACLU, and we couldn't get the Federal Court to move on the case. So Patrick said, why don't we just drop it, and I said, only if we can drop it with prejudice against the City. And the City agreed on that, so we dropped it.

THE COURT: What do you mean drop it with prejudice?

[60]

That would be favorable to the City. It would mean you couldn't restate it.

THE WITNESS: Well, I am not a lawyer, Your Honor, and paralegals don't know much about the law, though many of them think they do.

Mr. Wiseman advised me that if we would drop the suit and get it out of the way that it would, in effect, be a mark against the City and not against us. And I said, under those conditions, I would agree to drop it. If Mr. Wiseman misinformed me, I remain to this day misinformed.

Q. (By Mr. Maness) When were you arrested the second time under the ordinance?

A. I was arrested in '77 at the Asylum Bookstore in the 15 or 1400 block of Richmond. I walked into the store from the outside and noticed the presence of police officers on the scene, undercover vice officers. Since I knew the clerk at the store, I proceeded to the counter and asked him to give me the microphone. He gave me the microphone, I turned on the sound equipment and I advised the customers of the store to please get their identification out from their pockets so it would be convenient when the police officers in the building asked them for identification, and I was arrested.

Q. For interrupting an investigation?

A. For interrupting an investigation, disclosing the presence of police officers in an undercover investigation.

[61]

Q. What happened to that case?

A. We tried that case before the bench, or we went to try that case before the bench in Judge Youngman's Court again. And Judge Youngman—we filed a motion. Attorney Rick Young, who was attorney for the bookstore and not really my attorney, i was fighting my case as pro se in those days and he asked if he could file on my behalf a motion challenging the constitutionality of the interrupting a police officer, because there is a state statute called interrupting a police officer or interfering with a police officer, and the city ordinance complaint form read interfering with a police officer. And I suggested that I would be more than glad to have his motion. We filed that with Judge Youngman, he looked at it and looked at the state statute, and not only dismissed our case, but assured me, in open court, that all cases

filed for interrupting or interfering with a police officer would be dismissed, because that was the city usurping an area of the law that was then occupied by the state.

Q. When was the next time—

MR. CRAWFORD: Just so the Record is clear, I want the Record to be clear I am objecting. I realize this is a trial before the bench, but I am objecting to hearsay portions of this witness' testimony.

THE COURT: All right, I will sustain the objection

[62]

to the hearsay.

MR. CRAWFORD: Judge, I don't know, the Court has already stated, of course that the Court is going to exclude any inadmissible testimony. May I have a running objection as to hearsay and whatnot, or would the Court prefer—

THE COURT: Well, why don't you go ahead and object? Go ahead and make your objection and I will sustain the objection.

MR. CRAWFORD: Yes, sir.

Q. (By Mr. Maness) When was the next time you were arrested under the ordinance?

A. In the present case.

Q. And that was February 14th, 1982?

A. Valentine's evening.

Q. And what happened on that occasion?

A. My companion and I were at home, had been in bed and decided we were going to get up and go across the street to the convenience store to get something to drink. We walked out of the front of our apartment com-

plex, which was located at 420 Westheimer, and proceeded to the corner of Westheimer and Whitney where police officers had stopped a Portuguese friend of mine and was issuing him a citation, I subsequently find out, which was for making a left turn off of Avondale Street. You get a ticket for making any turn off of Avondale Street.

[63]

Q. What time?

A. It was a few minutes before midnight when I got up. It was probably—it was a few minutes before midnight and it was after midnight, and this is a few minutes after midnight on the 13th. after midnight on the 14th.

Q. What happened then?

A. The officers were writing the ticket. This Valentine's evening, it was a weekend evening and there is a lot of activity on lower Westheimer any evening, but weekend evenings and Valentine weekends especially. There is a lot of moving about. Suddenly one of the officers, while I was watching them from the northeast corner of the intersection, one of the officers ran from a position writing the ticket with his flashlight in his hand, and I looked ahead of him to see what was going on and there was another friend of mine, Charles Hill, who was helping someone get a truck out of a parking place or into a parking place; I don't know what was happening to the truck, but Charles was trying to facilitate traffic at that point. And the officers started screaming at the young man, saying you can't direct traffic, only police officers can direct traffic. And Charles was with a female companion whom I did not know and do not know to this day.

Q. What color was Charles Hill?
A. He was black.
Q. What color was his female companion?

[64]

A. White.
Q. What color were the two police officers?
A. Very white.
Q. What happened then?
A. The officers started screaming at Charles in his face about citizens cannot direct traffic and get over here, boy, and those kinds of derogatory statements. And Charles has a nervous tic, I don't know the name of the disorder, but when under pressure he has difficulty breathing and there is some upper thoracic activity; he makes strange sounds. So Charles was trying to get away from the officer and saw me and started in my direction. The officer grabbed him, turned him around and said, don't walk away from me when I am talking to you, boy. This was Officer—it wasn't Officer Holtsclaw; it was Officer Kelley. Officer Kelley has his flashlight in his hand and sometimes in Charles' face. He grabs Charles, turns him around and said, don't walk away from me when I am talking to you, boy. And Charles just kind of stood there and Officer Kelley apparently decided he had nothing to say, so he said, move on, move on, get out of here. And Charles started walking in my direction. By this time, I crossed the Whitney Street in the direction of where the activity is, because I am concerned. I know that Charles is very frightened of those kind of situations; it frightens me.

[65]

Q. About how far away were you from the officers and Charles Hill at the time you first noticed it?

A. The beginning of it, they are about a hundred feet beyond the intersection and I am right on the opposite side of the intersection. Then I cross over and Charles passes right by me and Officer Kelley at that point is about fifteen feet in front of me, when suddenly Officer Kelley runs past me and Patrick and grabs Charles at the intersection, at the northwest edge of the intersection and screams, are you making fun of me? In a very loud intimidating voice. Are you making fun of me? And Charles is a very muscular person and whenever he goes into these spasms, he appears to be even bigger. And he grabs Charles with one hand and the flashlight on Charles' arm and drags him some distance, then the other officer who comes over and Officer Kelley says to Officer Holtsclaw, this man is making fun of me. I think he wants to fight. And Officer Holtsclaw, who was in the Courtroom earlier today, is also a muscular person, so he does his arms like this, you want to fight with me? And then they both grab Charles and carry him to a point close to the house that's on the intersection. I am watching all of this from about twenty-five to thirty-five feet away. They get him up to the edge of the house and whenever Officer Kelley takes his flashlight and changes ends so he is holding the light end of his flashlight in his hand and draws back, I say,

[66]

don't hit that kid, he has done nothing wrong. If you want to pick on somebody, pick on somebody your own size.

Q. How far were you from Officer Kelley and Holtsclaw and Charles Hill when you made these verbal statements?

A. At least twenty-five, probably forty-five, forty feet.

Q. What happened?

A. Officer Holtsclaw and Officer Kelley look at me and Officer Kelley says, are you interfering with me? And I repeat that Charles has done nothing wrong and they come and arrest me.

Q. When Officer Kelley first spoke to you, how far was he from you?

A. There is no way they could have been less than twenty-five, probably closer to thirty-five or forty feet. I am not the best at judging distances.

Q. Okay.

A. It was further than it is from the end of that table.

Q. And what is you recollection of his words to you?

A. His first words to me were, are you interfering with me? And I remember them very distinctly.

Q. What did you say in response to that?

A. I said, the kid has done nothing wrong. If you want to pick on somebody, pick on me.

Q. And what happened?

A. They came and arrested me.

[67]

Q. Did they handcuff you?

A. Yes. Not immediately. It was kind of Keystone Cops time for a while. It was cold, February, and I had on a heavy jacket; I have got my hands in my pockets. They order me to take my hands out of my pockets and at the same time they are ordering me to hold my hand still, so they are yelling at me for not taking my hands out of my pocket and not allowing me to do that. They came and carried me, threw me across the back of the squad car. And in October prior to this arrest, I was in a very serious motorcycle accident and I was just barely

getting around at that point without crutches, and I am trying to tell them, watch the knee, and they are trying to knock my legs out from under me and throw me across the back of the car. Finally they wrestled my hands out of my pocket, which I would be more than willing to do that, I have been arrested many times, and when I am arrested I simply go limp, do whatever they say to do, because my chances are in Court, not on the street corner.

Q. Did either or both of the officers ever say to you, you are going to jail, or words to that effect?

A. They told Charles he was going to jail before I said anything, and then they told me I was going to jail on the way to the car.

Q. What happened to Charles Hill?

A. They turned him loose.

[68]

Q. What happened to the driver they were ticketing earlier?

A. They gave him his driver's license back and dismissed him. I understand from him his case was subsequently dismissed. Charles was never charged with anything.

Q. Other than the words—

MR. CRAWFORD: Your Honor, of course, I object for the Record; not personal knowledge.

THE COURT: I am sorry; I didn't understand. What was the last statement that you made?

THE WITNESS: Charles was never arrested.

THE COURT: All right.

MR. CRAWFORD: My objection was to what happened to the ticket that the officer wrote, what he understands subsequent to having found out—

THE COURT: All right, I sustain that objection.

Q. (By Mr. Maness) Was either Charles Hill or the driver of the automobile taken into custody?

A. No.

Q. Were you subsequently taken to jail?

A. Yes, and this is the only time in my life I have been arrested where I was really afraid.

Q. Why was that?

A. Instead of taking me to the downtown jail, they were carrying me to Beechnut. And Beechnut is, from my understanding, which is probably hearsay, where a lot of violence

[69]

against people under arrest happen.

MR. CRAWFORD: Object to hearsay.

THE COURT: Yes, I will sustain that objection.

Did anything happen to you at Beechnut?

THE WITNESS: No, but I sure begged that nothing happen to me all the way down there.

Q. (By Mr. Maness) Did you ultimately get transferred to the downtown jail facility?

A. Just a few moments too late to show up for Court.

Q. How long were you actually in custody as a result of your arrest in February of 1982?

A. Slightly over eighteen hours.

Q. And how were you ultimately released from custody?

A. Bond was posted.

Q. Other than the verbal statement or statements that you told the Court you made to these two officers, did you ever engage in any conduct or make any threatening gestures or otherwise give the appearance as if you were going to physically intervene in this encounter between the officers and Charles Hill?

A. Carefully kept my hands in my pockets, made no gestures of an aggressive or assertive nature. Because one can get hurt for doing that.

Q. Why did you make the statements that you made on the morning of February 14, 1982, to these officers?

[70]

A. I believed very sincerely if I had not interrupted those officers, my friend Charles would have been beaten in the head with a flashlight.

Q. What happened when you went to Court in this case?

A. The officers didn't show up—no, we had a trial in this case. The officers testified reasonably accurately, from the testimony that I heard, and of course we testified as to facts as we understood them, and we were found not guilty by the Judge.

Q. When was the next time you were arrested under this ordinance?

A. The next time I was arrested was the—I'm sorry, Mike; the dates evade me. Do you have that complaint?

Q. Let me refresh your recollection by showing to you —well, let me do this, with the Court's permission, Your Honor. We will offer Plaintiff's Exhibit Eight and Nine, which are two complaints related to the Plaintiff's arrest on February 14th, 1982, which he just testified to, and

his next and last arrest, which occurred on October 3rd, 1982.

MR. CRAWFORD: Plaintiff's Eight or Nine or Seven and Eight?

MR. MANESS: They have been renumbered. Eight and Nine.

MR. CRAWFORD: They have been renumbered?

MR. MANESS: Yes, sir.

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THE COURT: I will admit them into evidence.

Q. (By Mr. Maness) What happened when you were arrested on October the 3rd, 1982?

A. Patrick and I, my companion and I had been out at my mother's for dinner. We returned to the downtown area just about dark and we were walking home. We were at that time living at Fred Pye's Community Service Center, which is 301 Avondale Street, just around the corner from the previous apartment. We saw police officers driving east bound on Avondale Street in the block just prior to the center with their lights off, after dark. So I suggested that something was going on, reached in my pocket and took out my press pass so it would be in my hand and I could keep my hands visible for the police officers. They were apparently approaching a car that we were walking next to. After we passed that car and were about a car length behind it, I took a position on the—not on the street side, but on the opposite side of the street from the sidewalk next to a fence with Patrick next to me. Officer Prendergast and his partner pulled up about even with us and his partner got out of the

driver's side, Officer Prendergast got out of his side, flashed the flashlight at Patrick and I said, get the fuck out of here.

Q. What did you do?

A. I asked Patrick to go home and advised the officers that I would like to see what was going on and proffered my press

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pass.

Q. What happened then?

A. He said, if you are not going to get the fuck out of here, you are going to jail.

Q. How far were you from the automobile that was being investigated, approximately?

A. I was a car length behind and on the opposite side of the sidewalk. So what would that diagonal measurement be? In excess of twenty feet.

Q. Were you the only person on the sidewalk at this time?

A. Patrick was next to me.

Q. Other than Patrick?

A. Yes.

MR. MANESS: Your Honor, I had not anticipated this, but with the Court's permission, what I would like to do is proffer the Defendant's City of Houston and Harris County press passes now, have them marked as Plaintiff's Exhibits Numbers Eleven and Twelve, and then make Xerox copies of them for inclusive in the Record so that they may be returned to this Defendant—to this man.

THE COURT: All right, go ahead.

MR. CRAWFORD: I object to these. The date of the issue was not in effect at the time of these instances, from the time—

THE COURT: I'm sorry. What is the objection?

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MR. CRAWFORD: My objection is they were not the press passes—those are '83 press passes and we are talking about '82.

MR. MANESS: May I ask a clarifying question?

THE COURT: Yes.

Q. (By Mr. Maness) Mr. Hill, did you have an equivalent press pass to this one issued for 1982?

A. I have carried press passes with both city and county since 1975 without interruption.

MR. MANESS: Your Honor, even though this is the current press pass issued to Mr. Hill by the City of Houston, signed by Chief Lee P. Brown, we think it is relevant and material to show this man is an accredited representative of the press, is recognized as such both by the City of Houston and by Harris County.

THE COURT: Well, in other words, they are just for illustrative purposes to show me they are identical to the ones he had before, you say?

MR. MANESS: Yes, sir.

THE COURT: I will admit them for that purpose.

MR. CRAWFORD: No problem with that, Judge.

THE COURT: Those are Exhibits Eleven and Twelve?

MR. MANESS: They will be so marked, yes, sir.

THE COURT: All right.

MR. MANESS: Are they admitted?

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THE COURT: Yes, sir. Go ahead.

Q. (By Mr. Maness) Did you tell this officer, when he spoke these words to you, that you had press passes?

A. Yes.

Q. And did that make any difference to him?

A. No.

Q. What happened in this case? Were you arrested?

A. Well, in this case, I was arrested and went to jail, yes.

Q. Did you have your hands handcuffed behind your back?

A. Sure did.

Q. By the way, Mr. Hill, were you handcuffed behind your back on each of the four cases you were arrested?

A. The vice squad did not handcuff me at all, in the bookstore case, and that was in '77. The other cases, I have always been handcuffed with my hands behind me.

Q. How long did you stay in jail as the result of your arrest on October 3rd, 1982?

A. Oh, I had to get out of—my law firm bailed me out the next morning, because I had a trial in progress that I was assisting on. So I was in jail about eight hours.

Q. What happened to that case in terms of its disposition in the municipal court?

A. We went to trial, you were my attorney, and the officers didn't show up and we tried to get a continuance. As a matter

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of fact, we went over to the vice squad and tried to get the officers, but they couldn't be found. So over our objections, the case was dismissed.

Q. Other than these four arrests by Houston police officers under the ordinance that's at issue in this case today, have you ever been arrested on any other occasion by Houston police officers?

A. Well, other than the case that I was arrested where I was sent to prison, I have been arrested twice for failing to show proof of identity. In one of those cases—I have never been convicted, incidentally.

Q. Now, were you, on one occasion in July of 1982, arrested outside a municipal court courtroom?

A. Yes, I was.

Q. And who arrested you on that occasion?

A. Officer J. S. Crowe.

Q. And is he a Houston police officer?

A. Houston police officer, yes.

Q. What were the circumstances of your arrest on that occasion?

A. Well, I was in the Courtroom to cover a story. I had my press pass on my tee shirt, and I saw Officer Crowe and a Texas Southern University safety and security officer just gesticulating in view of the jury in a condescending way about defense witnesses, doing the limp wrist thing and making faces.

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Judge Wilson, Fred Wilson in that court, I think he saw it, but he turned so as not to see it. But the jury could see it, and was watching the officer's antics. So I made a

point of watching the officers, by turning in the front pew of the courtroom and looking at them. And wherever I got up to leave, because I had a news broadcast to do, I took out my pad and wrote down their names off of their nameplates and walked out into the hall. They had followed me out there; I knew who Officer Crowe was, anyway. I just didn't know who the other officer was, and Officer Crowe said, let me see your driver's license. I advised him that one does not need a driver's license in the lobby of a municipal court building where one is a pedestrian there. And he, with the assistance of the vice officers that were outside in the hall, threw me up against the wall and handcuffed me and carried me forthwith to jail and charged me with failure to identify as a witness.

Q. What was the disposition of that case?

A. We went to trial and it was dismissed and was subsequently, with your assistance—I subsequently, with your assistance, sued the City of Houston and the ordinance was declared unconstitutional. I received five thousand dollars compensation in damages for having been arrested for that.

Q. That was the case that was filed in Judge Seals' court; is that correct?

A. That's correct.

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Q. Now, other than these events that you have testified to, have you had any further arrests? I mean, physically taken into custody by the Houston Police Department, since your release from prison?

A. No.

Q. Have you ever, on any occasion, either before or after February 14 of 1982, the date of the arrest that's

the subject of this suit, been threatened by any Houston police officer either with arrest or criminal prosecution?

A. Oh, yes. On a couple of occasions.

Q. What, without going into any meticulous detail, what generally were the reasons or the causes of those threats?

A. Just one evening casually, a month ago, I was going from the radio station home after my Thursday evening shows and police officers stopped me, demanded identification. I told them I wasn't going to show any identification and he said, you might me Ray Hill, rolled his window up and drove off.

Q. Are you well known to the police who patrol the Montrose-Westheimer area, Mr. Hill?

A. Very much.

Q. Do you know—

A. I can name them, if you would like me to.

Q. For the Record, please, what kind of neighborhood do you live in? That is, the Montrose-Westheimer area of Houston.

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A. It is probably as eclectic a neighborhood as there is in Houston. I think the demographics on it show that about twenty percent of the population are gay men and lesbians; something like fifteen percent of the population is of Hispanic heritage; five to seven percent is black and the rest are predominantly older, many retired citizens. The Montrose area of Houston is attractive to the jet set, social swirl group; there are many attorneys, many judges that live in the Montrose area. The Mayor lives in Montrose. It is a very diverse and eclectic neighborhood. It is highest concentration in the city of

gay oriented businesses: bars, bookstores, restaurants that have particular outreach to the gay community. There are some four churches in Montrose that have special outreaches to gay people, and non-gay churches have large gay congregations. It is an interesting neighborhood; it is the center of our political power and social life.

Q. How long have you lived in the Montrose-Westheimer area?

A. Well, since 1975 without interruption. Prior to that, since about 1965; 1965 to 1970 and 1975 to the present.

Q. Would you say that at the time of your arrest in February of 1982, and for that matter today, there is a relatively high proportion of police-citizen contact in the Montrose-Westheimer area?

A. Oh, yes. Some of it, community organizations and bars

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frequently, at my encouragement, hire off-duty police officers for foot patrol. That's one of the things that we have done in the neighborhood to reduce the incident of crime. About 1982, early part of the summer, the City doubled the amount of patrol personnel that they had in that district, and that has continued to date. So there are literally twice as many officers in district seventeen than there are in other districts on the second shift, which is the three to eleven or two to ten, depending on which shift you make. There are twice as many police officers, and police officers in the Montrose area generally get out of their cars and have contact with people on the streets more frequently than I see them do in other areas of the town, with the possible exception of Dowling and North Main.

Q. Can you tell the Court, and would you state for the Record, if there is any significant amount of cruising that goes around in Westheimer, and if there is, state what cruising is.

A. I don't know whether you are talking about police cruising, driving around looking for crime, or if you are talking about homosexual-heterosexual street cruising.

Q. The latter.

A. Homosexual and heterosexual street cruising. Lower Westheimer has become somewhat of a combat zone, with a lot of massage parlors and girlie bars and things of that nature,

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so there is a high concentration of those businesses there and free enterprise of female prostitution that takes advantage of the clientele that go to those businesses and try to solicit their services off the street before they get into the business. So there is certainly a goodly amount of that, especially on lower Westheimer, especially on the weekend. Gay cruising may or may not involve prostitution. There are certainly male prostitutes in the area that cruise or are there for the purpose of being cruised; there are also a large number of non prostitutes, gay males who are seeking introduction to people in the area that do not involve prostitution. More of that activity goes on in Montrose. I think that the arrest records that I have seen indicate that there is probably more of that activity in the 22, 2500 block of Jensen Drive and in the 93 to 9800 block of Main Street and in certain areas of Almeda Street than there is in Montrose, but Montrose is pretty competitive in the number, amount and volume, to those areas previously mentioned.

Q. Mr. Hill, how long have you had your shoulder length hair and full beard of six or eight inches?

A. I have been working on this particular beard for almost two years now, and although my hair is longer now than it has been in recent history, I have from time to time had long beards and long hair.

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Q. Do you ever wear, in public places, tee shirts espousing political causes, particularly the shirts that promote gay rights or homosexual rights?

A. My wardrobe consists of this suit and a shirt to wear with it and a tie, about five pair of Levis of various colors and ages, and about five hundred tee shirts.

Q. And how many of those have political messages on front of them?

A. They either have something to say about KPFT or some aspect of some political event or movement in the gay movement over the last ten years.

Q. Do you think the police, the Houston Police Department, and I'm referring specifically now to male police officers, tend to harass or pick on homosexual males in the Houston area, and particularly in Montrose-Westheimer?

A. I think that's statistically substantiable.

Q. What is your attitude or your reaction to that?

A. Well, I would rather that I get arrested than those whose careers can be damaged; I would rather that I get arrested than those whose families wouldn't understand; I would rather that I get arrested than those who couldn't spend a long time in jail. I am prepared to respond in any legal, nonaggressive or nonviolent way, to any illegal police activity, at any time, under any circumstances.

MR. MANESS: Pass the witness.

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THE COURT: It's twelve fifteen, so let's recess for lunch. Let's get back here at two o'clock and come back to work.

We stand recessed, and you are free to leave.

(Lunch recess was taken at this time.)

THE COURT: All right, you may cross.

CROSS-EXAMINATION

BY MR. CRAWFORD:

Q. Mr. Hill, prior to your arrest on February the 14th of 1982, which is the day of the incident made the basis of this lawsuit, is it fair to say that you were familiar with the City statute which made interfering with a police officer, interrupting a police officer in the execution of his duties a crime?

A. I was familiar with that, yes.

Q. And prior to your arrest on February the 14th, is it fair to say you had actually read that statute or that ordinance? Is that not correct?

A. That and related state law.

Q. Indeed, it was under the ordinance that we are talking about, 3411, that was the ordinance for which —under which you were arrested in 1975, your first arrest under this ordinance?

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A. Yes, that's true.

Q. And at that point in time, you filed a lawsuit against the people that arrested you?

A. That's true.

Q. And in a subsequent time prior to this arrest, am I correct you were arrested again for a violation under that ordinance?

A. Around 1977, yes.

Q. And so it is fair to say that this ordinance came as no surprise to you; is that correct?

A. The ordinance is no surprise to me, that's correct.

Q. And I guess it's true that you take it that on each one of your arrests under this ordinance, you felt like your conduct was not violative of that ordinance; is that correct?

A. I felt that way, and I have not been convicted under this ordinance.

Q. But I am just asking you as to your feelings.

A. Yes, I felt that I was not in violation of this ordinance at that time.

Q. Your first arrest back in 1975 occurred at what location?

A. Near the intersection of Hawthorne and Stanford, actually in, I guess, the 2300 block, 2300 block of Stanford.

Q. What time of day did that arrest occur?

A. About ten thirty in the P.M.

Q. In the evening. What were you doing at that location?

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A. I had gone there because I had received a report that police officers were harassing people in that area.

Q. I mean, why did you, Ray Hill, receive such a report?

A. Well, number one, Houston Human Rights League was formed at that time, and that's Houston Human Rights League's business, or what we state our business is about, is to protect people from abuses of public officials like police.

Q. What was the crux of the allegation as far as abuse? What was going on, supposedly?

A. Well, the report that I received—I was in a restaurant eating dinner in the 600 block of West Alabama with guests from out of town. Someone came by and said that they had been stopped by the police officers and police officers were stopping everyone in the area and running a check on their identification to see if there were any outstanding warrants, demanding identification from everybody they stopped and verbally abusing people. I have several problems with the described behavior and I will be more than happy to enumerate them, if you want me to.

Q. What did you do? Did you leave the restaurant and go to the location?

A. I asked my guests to meet me later at a club. It was not my intention to get arrested. I went to the location to see what was going on and see if I could identify the officers that were involved and recognize some of the people that were

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involved, so I could do a later check of what was going on.

Q. What was the nature of the harassment, the allegation of harassment? Was it that the police were harassing gay people?

A. Yes.

Q. Isn't it true that at the time, there was quite a dispute amongst, let's call them the residents in the neighborhood and people that frequented the area, a dispute amongst those two groups as to traffic in the particular area where you were arrested?

A. Well, I was working with a citizen's group of residents in the area to strategize ways of lessening the traffic congestion after midnight in this neighborhood. I was friendly with the residents. I knew some of the people that were being harassed.

Q. To set the scene, at the time that you arrived at the location, isn't it true that you had a group of residents complaining that their streets were being used as cruising spots?

A. Yes, I was working with those residents in trying to resolve their complaints on a day to day basis. I had meetings with members of the community, I had set up temporary offices in one of their homes trying to analyze the situation and strategize what might be done to lessen the volume of traffic in their neighborhood during those periods of time. I worked

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very closely with neighborhood groups of that nature, and have for years.

Q. And when you arrived on the scene there, you started writing down license plates of police cars?

A. License plates of the cars that were stopped and the identification number on the police cars. The policemen change license plates from car to car frequently, and the only way you can get a fix on who is in the car is on the identification number, not the license plate.

Q. And it's at this point in time, your testimony, that one of the police officers comes up to you and says what?

A. Officer Stoffle's partner didn't come up to me. He hollered, hey you. Well, I had written down what I wanted there from that scene and I was going to the next corner, where another police officer had stopped and had traffic stopped three or four cars deep back there. And I went back—I was on my way back toward my car to change locations to observe what was going on at the other intersection, when the officer told me to stop and come there.

Q. What's the closest that you ever got to the officers that arrested you prior to them arresting you?

A. Thirty-five, forty feet.

Q. You never went up to them while they were attempting to write a ticket and try to ask them for their names and badge numbers?

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A. No; didn't say anything to the officers at all.

Q. Let's talk about your second arrest in '77.

A. Yes.

Q. That was at the Asylum Bookstore?

A. Yes.

Q. Do you work there?

A. No.

Q. Have you ever been employed by the Asylum Bookstore?

A. Not by the Asylum. I have done some contract work for the company that owns the Asylum. I have never been employed at the Asylum Bookstore, no.

Q. Where were you before you went to the Asylum on that night?

A. It was during the daytime.

Q. During the day?

A. Yes.

Q. Where were you?

A. I had been over to the company offices, which at that time were located on Smith Street.

Q. The company of what?

A. Montrose Ventures, the people that owned the Asylum.

Q. And was it there that you received a phone call? I'm trying to get how it was that you came to go from there to the Asylum.

A. I just went there to the Asylum because, number one, I

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had some friends that worked there and number two I thought I was off for the rest of the day. I did not get a call alerting me that there were police officers at the Asylum; I went to the Asylum on my own volition.

Q. When you got to the Asylum, what did you see?

A. I saw two cars that I recognized to be vice squad vehicles.

Q. Where were they?

A. In the parking lot.

Q. Were they there when you got there?

A. They were there when I got there.

Q. Did you continue into the Asylum?

A. I went into the Asylum.

Q. What did you do next?

A. I asked him if I could use the microphone on the sound system. He handed it to me and I turned it on. I advised the patrons in the store to get their identification handy in the event that the officers in the store wanted them to document their identity.

Q. Did you do that gratuitously?

A. I did that in an effort to bring people in compliance with law, which is an affirmative defense under section 3805 subsection A, paragraph three of the Texas Penal Code.

Q. What laws were they—

A. That is the hindering, apprehension and prosecution

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sections of the Texas Penal Code, and it is the State law that governs the matter on which we are on trial here today.

Q. Did you have any knowledge when you went into the Asylum that anyone was going to be hindering the apprehension of an individual?

A. No. I wasn't going to hinder the apprehension of anybody. I was going to try to bring people into compliance with the law, which the law states I have every right to do.

Q. Did you know that the police officers wanted them to do that, had asked anybody to produce their identification?

A. I assumed that the police officers were asking identification of the patrons inside the store.

Q. Well, did you see them do that?

A. I didn't see the officers until after I finished with the microphone, and they came to arrest me.

Q. You don't know what the officers were in there for, do you?

A. No. I have a pretty good idea from my previous experience about such things. If you would like me to elaborate, I would be glad to.

Q. Well, no.

With respect to the facts in this case, you had no idea whatsoever what those particular officers were doing in the Asylum on the day in question?

A. I did not have certain knowledge; I had a good idea.

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Q. No police officers asked you to make that announcement, did they?

A. Certainly not.

Q. Let's talk about your arrest on February the 14th, 1982.

A. Yes, sir.

Q. What was your first verbal exchange with the officers?

Let me put it more directly. What did you first say to the officers?

A. I first told the officer not to hit Charles. I went on to say that he had done nothing wrong, and I went on to say that if they had to pick on someone, they should pick on someone their own size.

Q. You didn't first yell to them, the kid had done nothing wrong, why don't you pick on someone your own size?

A. Close, words to that effect, yes.

Q. Well, what I am looking at, Mr. Hill, is in your deposition, Exhibit Number One. I don't find the words don't hit him, or you don't have to hit him in there.

A. In reading from my statement, my motivation was to stop them from hitting Charles.

Q. Okay.

A. Which was apparent to me at the time, and I think you will find that in the same affidavit. The words that I had used was that he had done nothing wrong.

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Q. Excuse me, Mr. Hill. That's what you told me on deposition, that your first comment to the officers was words to the effect, he has done nothing wrong, why don't you pick on someone your size; is that correct?

A. That's close enough, yes.

Q. Good. Well, the point I'm trying to make is that your first words to the officers were not, don't hit him; is that correct?

A. That's accurate.

Q. And as a matter of fact, you never saw the officers hit Mr. Charles Hill?

A. No, he did not hit him, that's true.

Q. And as a matter of fact, upon your arrest, you told them no excessive force was used with respect to your arrest?

A. I was wrestled around pretty good. If I told you that, I apparently didn't give you the right impression. I was grabbed from both sides by two very strong, young police officers. I was carried and dragged a distance of about fifty feet, thrown over the back of the squad car, my hands removed from my pockets after I repeatedly tried to do that voluntarily, me explaining, I am willing to cooperate, all of this rough housing is not necessary, for the whole time.

Q. Okay.

A. And I had, as a result of that struggle, firm reason to believe that I was fixing to be seriously assaulted by the

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police officers when we got to the substation, and their tape will show a very, very persuasive argument why that should not happen.

Q. And you weren't, as a matter of fact, in any violence?

A. I was not, but I had every reason to believe at that time that I was about to be.

Q. By the way, did you show them, that night in question, did you show them your press badge?

A. They removed it from my pocket themselves.

Q. Do you remember on your deposition, when I asked you on page sixty—excuse me; Mr. Cobb asked you, I believe, on page sixty, at line thirteen through twenty-five—

THE COURT: You can just read it to him. The question and the answer, just read it to him, and ask him if that's what he said.

Q. That's what my question was, the Court's procedure. "Did the officers use excessive force on you?"

Your answer was, "No."

Question: "Did at any time, to your way of thinking, the officers use excessive force on you?"

Answer: "Other than Officer Holtsclaw offering to fight me, I really don't think there was any offer of violence."

Question: "No actual physical, excessive force used?"

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Your answer: "I got handled pretty roughly when he threw me against the car a little bit, but I don't think I had a bruise or scratch as a result of that. Handcuffs were a little tight."

A. I remember saying those words to you, and what I meant was I had no marks or bruises or injuries as a result of the way I was handled, but I think, I am pretty

clear I was handled roughly up to the point that I was thrown against the car.

Q. What was the next thing that you said to the officers?

A. The officer then spoke to me.

Q. Okay, sir. Please tell me what he said.

A. He asked me if I were interfering with him. His words, are you interfering with me? I could hear it clearly from the distance and I, again, repeated, why don't you pick on someone who can handle it?

Q. Meaning what?

A. Meaning that I knew how to be handled, and if they wanted to come arrest me, that was the legitimate thing to do, or an illegitimate thing to do, but we would have a trial at a later date to determine whether or not it was legitimate, but they shouldn't hit a frightened young man up side the head with a flashlight because he has a nervous twitch, is what I meant.

Q. In other words, you meant to provoke the officers into

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directing their attention to you as opposed to Charles Hill?

A. My intention in the whole thing was to prevent the officers from brutalizing Charles Hill.

Q. And how were you going to carry that intention out?

A. And if I can replace Charles, if I can put myself in Charles Hill's stead, then I felt I had a better chance of survival without injury than he did.

Q. You were going to direct the officer's attention from Charles Hill to yourself?

A. I was going to try to stop the officers from hitting Charles Hill. And if my verbal challenge to the police officers meant diversion of their attention, that is true.

Q. Do you think that the phrase, why don't you pick on someone your own size, is a phrase that's calculated to calm matters and smooth matters?

A. Under the circumstances, I think it would at least calm them to the degree that Charles might not get hit, and as a result, he was not.

Q. Do you find, you yourself, personally find anything provocative about the statement, why don't you pick on someone your own size?

A. Not provocative, no.

Q. What happened after they asked you—you told them, why don't you pick on someone your own size?

A. Well, the second one was, why don't you pick on someone

[95]

that can handle it? Then, Officer Kelley forgot what he was doing. He was the one with the flashlight drawn back, and he came over to my area and placed me in custody, shortly followed by Officer Holtsclaw, leaving Charles and his female companion and—I believe the other guy's name is Andrew in Spanish, whatever that is, or in Portuguese, left those folks over there and came and grabbed me and secured me in back of the police car.

Q. By the way, have you ever had any dealings with either Officer Kelley or Officer Holtsclaw before the night of February the 14th, '82?

A. No.

Q. Never seen them?

A. Not in the area, no. And I usually know the officers in the area. And from their nervousness, the facial ex-

pression at the passerby, condescending at the usual people in the community, maybe a little different, indicated to me that they were fresh officers. That was my immediate impression, and still is.

Q. I want to talk about your arrest after this, which occurred—

A. October the 3rd.

Q. And that arrest in October of 1982, you and your companion were walking back from where, sir?

A. From my mother's house.

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Q. And you observed what?

A. I observed a squad car. This was shortly after dark; it was certainly at a time when other citizens had their lights on on their cars, and I observed a squad car approaching us or the point where we were with their lights off at a very low speed. The car was east bound on Avondale in the 300 block. I was living at the time in 401 Avondale.

Q. And what did you do?

A. Well, before they got there, I took my press pass out of my pocket, because I know better than to reach into my pocket with police officers in the neighborhood, in the immediate vicinity, because they don't really want to see you reaching for things.

Q. I understand that, sir. But what was your purpose in wanting to have a press pass in the first place?

A. I thought they were after me. I thought they were going to stop me, and I had done nothing wrong and I was getting the form of identification I would be willing to show them out of my pocket.

Q. Why did you think they were going to stop you? Had they—

A. I did not—

Q. Excuse me. Had they followed you, or—

A. No.

Q. Why did you immediately assume, then, that they were

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going to stop you?

A. Well, I was the only person, we were the only two people in that block, as far as I knew.

Q. Well, why did you assume that they were going to stop anybody?

A. Listen, I don't know how to put this into the Record, but I have had two friends killed by police officers on dark, lonely streets. Fred Pyes was murdered in an alley behind a police warehouse; Gary Wayne Stock was unarmed at the time and shot by police officers in a block near Main Street. And police officers are creeping very slowly without their lights on on a heavily tree-lined dark street, I am concerned for my own safety.

Q. Well, why did you think they were going to stop you?

A. I don't know. I just—Patrick and I were the only two people in the area, and here comes a squad car coming our direction, after dark with its lights off, moving very slowly, and I was alarmed to the degree to suspect that I was about to be stopped.

Q. It's fair to say that that Avondale is a street that runs parallel to Westheimer?

A. One block north.

Q. It's in the height of Montrose district, would you agree?

A. Right.

Q. There have been a lot of problems with respect to crime,

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burglary, rapes, muggings, robberies? You agree with me?

A. Sure.

Q. As a matter of fact, you were instrumental, one of the people that was involved in trying to get off the ground a group of citizens known as the Montrose Day Patrol?

A. Montrose Patrol, yes.

Q. Which purpose was to try to monitor the crime going on in that area?

A. Absolutely.

Q. Knowing all that, can you think of any other reason why these patrol cars might be—was it an unmarked car?

A. No, it was a squad car.

Q. Can you think of any reason why a squad car might be cruising that area with a slow speed with its lights off?

A. My immediate thought was the safety of myself and my companion. Because the law, the police violate a lot of laws in regard to violence in the area as well. That's one category of illegal activity in the area that you left out.

Q. So are you now retracting your statement?

A. No.

Q. Excuse me, Mr. Hill. Are you now retracting your statement that you pulled out your press card because you thought they were going to pull you over?

A. That's exactly what I thought, and our safety was the first of my concern. I don't know why anything I said should

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be considered a retraction.

Q. Why do you want to pull out a press card? What does that—

A. Well, it is an official city document that's issued by the police officers, by the police department itself. I get my press pass, usually, used to from Larry Trout until he got replaced, and it is a positive identification. If there are any questions why I am anywhere, I am willing to show a police officer my press pass in that regard. I am not willing, when I am a pedestrian, to show a police officer my driver's license.

Q. Were you working at the time?

A. A news reporter from KPFT, like a police officer, never gets off duty.

Q. So you are on twenty-four hours a day?

A. Twenty-four hours a day.

Q. Were you paid by KPFT at the time?

A. The only time I've been paid by KPFT is when I was manager, and at this point in time I was not manager.

Q. After you pulled out the press badge or card, what happened next?

A. The officers pulled up parallel with us, right—we were on the sidewalk and they were on the street right beside where we stopped. Both officers got out of the car. Officer—I don't have my complaints and I don't remember his name, but

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the officer closest to me, young, large police officer, flashed his light on Patrick and I and said, get the fuck out of here. In those exact words, while the other officer proceeded to the car that we had just passed and opened the door of that car and dragged a young man out.

Q. Had you seen that young man in the car that you had just passed prior to seeing the officer?

A. After we had stopped, after I had my press pass, I then looked in the area and saw the young man asleep in the car.

Q. Was it dark at the time?

A. Very dark.

Q. How close to the car had you been to see this young man?

A. I had walked right by it, but I couldn't see through the windshield because of the street light that was reflected off the windshield. The street light was east of where the car was parked, and walking past the car in the front, it was on the other side of the street and there was a glare on the windshield. I couldn't have seen that person, except through the rear. And after I had stopped and pulled out my press pass, looked around, and then saw the man sleeping in the car.

Q. How far away were you from the car?

A. A car length behind that car and on the other side of the sidewalk. A distance, I would say, of twenty, twenty-five,

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twenty-six feet.

Q. Were you on the other side of the street from the car?

A. No, same side.

Q. Same side of the street?

A. The other side of the sidewalk. I stepped off the sidewalk, Patrick and I both stepped off the sidewalk next to the fence so as to give the officers plenty of room to do whatever it is they wanted to do.

Q. Was this car parked—where was it parked on the street, or in the driveway?

A. It was legally parked at the curb.

Q. After that officer told you to get the fuck out of here, what happened next?

A. I asked Patrick to go on home, which was just the next block, and explained to him that, no, I would like to see what happens and handed him my press pass.

Q. You handed Patrick the press pass?

A. No, I handed the officer the press pass.

Q. And what did he tell you?

A. He said, if you don't get the fuck out of here, you are going to jail.

Q. Did you get out?

A. No.

Q. He took you to jail?

A. That's right.

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Q. Mr. Hill, you have mentioned that you had previously sued the City of Houston—

A. That's correct.

Q. That is correct, is it not?

A. That's correct.

Q. That was challenging, however, an action that was taken by a police officer acting under a state statute; is that correct?

A. Failure to identify as a witness is a state statute. I can cite it for you, if you want.

Q. The point I am trying to make, Mr. Hill, I heard your testimony this morning where you indicated you had sued the City and an ordinance was found to be unconstitutional.

A. Well, it is a city ordinance, as applied to city. You see, municipal courts do not deal, as I understand it, and if I am wrong one of you fine barristers can correct me, the City of Houston Municipal Courts deal with the enforcement of municipal ordinances. If the state statute has a law in it, such as 3802 of the Texas Penal Code, which is failure to identify as a witness, what the city actually enforces is a city ordinance codifying that in the city ordinance statute.

Q. Regardless of whether you are right or wrong on that, what you were arrested for is under 3802 of the State Penal Code?

[103]

A. Was under 3802.

Q. Yes, That case was settled?

A. That case was settled, actually. The precedent case was out of San Antonio, Brown versus Texas.

Q. And what I'm trying to get at is, you settled. No city ordinance was declared unconstitutional in that action, brought by you?

A. No, you are right.

Q. I just wanted to clear that up for the Record, sir.

A. Part of the agreement with that was that the City would no longer enforce that section of the ordinance code in Houston.

MR. CRAWFORD: Judge, I have no more questions.

THE COURT: Anything else?

REDIRECT EXAMINATION

BY MR. MANESS:

Q. Mr. Hill, have you had a chance to see the video tape of the arrest of Steven A. Long from Channel 2 in April of 1983?

A. A couple of times, yes.

Q. Was the manner in which you were arrested on February 14th, 1982 and half carried, half wrestled over the patrol car and spread across, either the hood or the trunk—

A. The trunk.

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Q. —of the car, was that basically what happened to Mr. Long, or was basically what happened to Mr. Long the same thing that happened to you the night you were arrested?

A. Jack wasn't there to struggle to protect me, but the procedure was about the same.

Q. And would you say it's a common or uncommon occurrence for a person or persons to be walking along the sidewalk in the Avondale and Westheimer area of Houston and to have a police car come along, stop at the curb, turn on its lights, and to have a police officer get out of the car, walk to the person or persons on the sidewalk, and without any apparent justification or excuse or reason, say, let me see some identification?

A. I have seen it scores of times.

MR. MANESS: Pass the witness.

MR. CRAWFORD: I don't have any more, Judge.

THE COURT: All right, you may step down, sir.

* * *

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* * *

JAMES KELLEY

The witness, after having been sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. CRAWFORD:

Q. Please state your name for the Record.
A. James Kelley.
Q. How are you employed?
A. I am a Houston Police officer.
Q. How long have you been with the Houston Police Department?
A. Approximately two and a half years.
Q. How are you currently assigned, Officer Kelley?
A. I am assigned to the motorcycle division.
Q. Back on February the 14th of 1982, how were you assigned?
A. I was a patrol officer out of downtown, central patrol station.
Q. On that date, did you have occasion to become involved with a gentleman by the name of Mr. Ray Hill?
A. Yes, sir, I did.

THE COURT: I'm sorry. What was the date of this

[3-40]

incident?

MR. CRAWFORD: February the 14th of '82.

THE COURT: Okay.

Q. (By Mr. Crawford) At one time, Mr. Kelley, you were a Defendant in this lawsuit, were you not, sir?
A. Yes, I was.
Q. Who was your partner on that night?
A. Ricky Holtsclaw.
Q. Where were y'all at the time that you made Mr. Hill's arrest?
A. I believe, without any paperwork in front of me, it was the vicinity of the 500 block of Westheimer.
Q. Is that in the Montrose area of town?
A. That's considered the Montrose area, yes, sir.
Q. Prior to the time that you arrested Mr. Hill, did you know who Mr. Hill was?
A. I had no idea who Mr. Hill was.
Q. Never met him and didn't know who you were dealing with; is that correct?
A. I had never met him, nor do I recall seeing his face, nor did I known the name.
Q. Let's set the scene, if we can, of the circumstances that led up to Mr. Hill's arrest. What was it that caused y'all to be at that location at that time?
A. My partner was issuing a citation for a traffic violation

[3-41]

to a traffic violator in that area.
Q. And what's your partner's name?
A. Name?
Q. Yes, sir.
A. Officer Holtsclaw.
Q. And what were you doing at this time?
A. I was standing by as the passenger officer observing the scene, observing the situation. I observed an

individual impeding traffic on Westheimer, stopping cars in the moving lanes of traffic.

You want me to continue?

Q. Yes, please.

A. I observed him attempting to stop a Metro bus at the time, and the bus driver failed to yield to him and almost ran over him. I called to him to come out and come over to me, which he did. I was speaking with that individual, deciding what action I was going to take towards him, whether it be a verbal warning of a citation.

THE COURT: Well, just exactly—you say he was impeding traffic. How was he impeding traffic?

THE WITNESS: He was standing in the middle of the road with both his arms raised, trying to stop traffic on Westheimer.

THE COURT: You mean he was out in the travel lane?

THE WITNESS: He was in the road, yes sir. He

[3-42]

was trying to stop traffic; he was out in the travel road of Westheimer, stopping.

THE COURT: He wasn't crossing the street or anything?

THE WITNESS: No, sir, he was stopping cars. I found out later that he was actually trying to stop the cars.

THE COURT: I see. Go ahead.

Q. (By Mr. Crawford) For the Record, is Westheimer a residential street or is it a thoroughfare type street?

A. It is a thoroughfare with some residences, but mostly businesses in this area.

Q. Is it a heavily traveled street or lightly traveled street?

A. It's a very heavily traveled street.

Q. Describe this individual that was out in the lane of traffic of Westheimer Street.

A. He was a black male in his early twenties, approximately five foot seven or five foot eight, very heavy, stocky, strongly built.

Q. Did you know who he was that night, prior to talking with him?

A. No, sir, the same situation. I had never seen him or didn't know his name.

Q. Did you subsequently find out his name?

A. Yes, sir, I did.

[3-43]

Q. Can you tell us his name?

A. His name—his last name was Hill, as well as Mr. Hill, no relation. I don't recall his first name.

Q. What did you talk with this individual about?

A. About impeding traffic and directing the flow of traffic in his capacity as a citizen, which was no capacity to do such, have such actions.

Q. Did you find out what he was tring to do, or what did he tell you?

A. He told me that he was trying to stop traffic so that a pickup truck could back out of a restaurant parking lot. No one was letting him get out into the roadway.

Q. Did you ever observe that?

A. No, I didn't see that. It could very well have happened, but I didn't see that.

Q. Did you have any more conversation with this other Mr. Hill?

A. Well, I was in the middle of a conversation with him. I had gained his ID; I believe it was a Texas ID card. I don't think it was a Texas driver's license, but it possibly was. I never took any citation action or anything like that with him, so I don't recall writing a citation and I don't know, don't recall if it was an ID or driver's license.

THE COURT: You accepted his explanation, in other

[3-44]

words?

THE WITNESS: Well, sir, I accepted his explanation and I was warning him that such actions were hazardous to his health and the well being of traffic in the area.

THE COURT: All right.

THE WITNESS: And at that time is when I came into contact with the Defendant.

Q. (By Mr. Crawford) Tell what happened.

A. Well, while I was dealing with the other Mr. Hill, the black male about the violation, I was still investigating that and deciding whether or not I was going to issue him a citation or not. I noticed that a crowd was forming in the area, which is not unusual, but the crowd seemed to be concentrated in the area behind me. And I heard someone holler to me to leave him alone.

Q. I'm going to ask you to very briefly, if you can, sketch in the area where you were located on Westheimer Street and where your conversation with Mr. Charles Hill took place. Can you do that for us?

A. Yes, sir. This is Westheimer running east and west. There is a side street, I don't know what the name of the side street is right here, and it was where we were

stopped. We had the police car and the individual's car right here, stopped on the side of the road, and my partner was over here issuing a citation. I was standing by at approximately

[3-45]

here, when I observed the individual impeding traffic on Westheimer.

Q. Is there a stop and go located on one side or the other?

A. Yes, sir, there is a stop and go located at the corner right here, I believe, or some sort of a convenience store.

The individual that was stopping the traffic was out in the middle of the roadway here. When I called to him, he came over to me and we were discussing the matter right here where I have the X. I felt a crowd forming around me; there was numerous people walking up and down the sidewalks here and they were crossing the street and they were slowing down, but they all seemed to be converging and centering in an area right behind me here on the corner.

Q. Where did you first notice Mr. Ray Hill?

A. Well, I first heard a voice from behind me. When I heard him yell to leave him alone, he didn't do anything wrong, I turned and saw him standing directly to my rear. This would be right about here. There was numerous people standing around him in a crowd like a conglomeration. I don't know how many people there were; maybe twenty or thirty people. He was here at the time.

Q. And at this point in time, when you heard that voice, what were you doing with the other Mr. Hill, the black man?

A. I was still speaking with him about the offense. I

was still in the investigative stage of finding out information

[3-46]

about the offense that had just occurred, whether he had a valid argument for his actions.

Q. Did you have any manner of physical contact with Mr. Hill, the other Hill?

A. No, sir.

Q. You didn't have your hands on him?

A. At the time that he called for me to leave him alone, no, sir.

Q. Prior to the time, had you had any physical contact with Mr. Hill, the other Hill?

A. Yes, sir. I believe what had happened was, while I was speaking with him, I still had his identification in my hand. He was a very strange individual. His actions were extremely erratic and strange. He was twitching all of the time.

Q. Twitching?

A. Twitching. His whole body would jerk while he was speaking and his body would jerk around and I didn't know what to make of that. I didn't know if he was about to have a seizure or if he was being insolent or what. I had no idea what to think of it.

Q. Okay.

A. So while I was speaking to him, his mind seemed to wander and he just seemed to turn around and walk away. I still had his ID in my hand and this was an official ID.

[3-47]

It wasn't just a fly by night, K-Mart ID card.

Q. So he turned around and walked away?

A. Yes, sir, he was walking away, twitching and making all kinds of strange noises from his throat.

Q. What did you do when he turned around and walked away?

A. I told him to stop. I told him to come back and he kept walking. I walked up behind him and kept telling him to stop and he kept walking, so I reached out and turned, took him by the arm and stopped him, turned him around. That was the extent of our physical contact.

Q. And when you finally caught up with him and turned him around, where did this take place?

A. Probably over here by the curb. It was right over, probably as far as from here to the defense counsel from where the actual investigation had begun to occur.

Q. So that took place about fifteen feet away?

A. Yes, sir.

Q. Okay.

A. And it was subsequent to that that I heard Mr. Hill holler at me to leave him alone, he hadn't done anything wrong.

Q. When Mr. Hill hollered that, what did you do?

A. I turned to see where it was coming from, because I knew there was a crowd back there. I saw it was Mr. Hill, or I saw it was this gentleman. I didn't know it to be Mr. Hill

[3-48]

behind me. At that point, I just ignored him. I turned back around and kept speaking to the individual.

Q. What else happened? Did you have some further dealings with Mr. Hill?

A. Well, I tried to speak with the individual some

more about why he was walking away, what was his physical or personal problem that he had for twitching around, if he had any type of ailment. I started to speak with him and I was interrupted from the rear again by Mr. Hill.

Q. How and in what manner did Mr. Hill interrupt you?

A. This time he was more loud, more boisterous, and told me, if I recall the exact words, he said, "I said, leave him alone. Why don't you pick on somebody your own size?"

Q. And how far away was Mr. Hill from him when he said that?

A. About seven or eight yards.

Q. What did you do after Mr. Hill said that?

A. Well, I turned to him again, knowing where it came from. He was standing in the midst of a large crowd behind me and I looked directly at him and I said, are you interrupting me in my official capacity as a Houston police officer? In my official duties as a Houston police officer is exactly what I said.

Q. What did he say to that?

A. He put his hands on his hips and he said, yes. Why don't you pick on somebody my size?

[3-49]

Q. And when he said that, what did you do?

A. He had already told me that he was interrupting me and he was challenging me and baiting me into an arrest, and I arrested him for the offense. That was the end of that. I gave the individual back his identification, decided not to cite him for the offense, and had him—

Q. By the individual, you mean the other Mr. Hill?

A. The other Mr. Hill, yes, sir.

Q. Upon arresting Mr. Ray Hill, where did you take him?

A. Directly to our patrol car, which was parked in the roadway here. I don't know which one of these cars, its been so long, which direction we were facing. But I took him directly from there, took him with my partner, because my partner came to assist me when I walked over with Mr. Hill, without any incident, and we walked directly to the patrol car, searched him for weapons and placed him in the rear of our patrol car.

Q. Didn't have any problems arresting Mr. Hill, then, I take it?

A. There was no incident, no, sir.

Q. Where did you take Mr. Hill upon arresting him? Did you take him downtown?

A. Well, sir, we were downtown officers and we would take prisoners downtown. However, on this particular evening, which is not strange on busy evenings, an announcement comes

[3-50]

over the police radio that downtown jail is not accepting any more prisoners other than hold prisoners, which is felonies and high misdemeanors, to be investigated by detective divisions. So this was a class C misdemeanor and we were required to take them an outlying substation. The closest substation that we could think of that was open was Beechnut substation.

Q. Did you tell Mr. Hill why you were taking him to Beechnut?

A. Yes, I told him that we were taking him to Beechnut substation, that the downtown jail was full.

Q. Did you have any conversations with Mr. Hill on the way to Beechnut or at the Beechnut substation?

A. Not on the way, other than advising him that we were not taking him downtown. I did have a conversation with him in the booking facility at the Beechnut substation.

Q. What did y'all talk about?

A. We talked about the arrest, the offense that had occurred and the reasons for his challenge.

Q. Did you talk specifically about Mr. Hill, the offense that had occurred?

A. Yes, sir.

Q. Specifically, what did y'all say?

A. Well, I didn't do a whole lot of talking. He told me that he doesn't usually get involved with patrol officers,

[3-51]

that his is usually on the end of investigative officers such as vice division. He told me specifically that he does go to places where vice officers are conducting investigations and interferes with them.

Q. Was there anything else about that conversation that you remember?

A. Nothing specific.

Q. You charged Mr. Hill for the offense under ordinance 3411, the interrupting statute; is that correct?

A. The interrupting statute, yes, sir.

Q. Do you have any idea as to the disposition of that case against Mr. Hill?

A. Yes, sir, I do.

Q. What happened?

A. He was found not guilty in Court.

Q. Was it a jury trial?

A. No, sir, it was a trial before the Judge.

MR. CRAWFORD: That's all I have got, Your Honor.

THE COURT: Let me ask you—excuse me for interrupting, Counsel.

MR. MANESS: Yes, sir.

THE COURT: Let me ask you, did the size of the crowd there at the scene, when you arrested Mr. Hill, did that have anything—and his position behind you and the position of these people, did that have any influence on you

[3-52]

as to whether or not to arrest Mr. Hill at that time?

A. Yes, sir, that had a preponderance, was the preponderance of the reason for that. I can tell that he was in charge of that crowd, that the crowd was gathering around him and that an incident was very likely to continue if I allowed an individual who had that type of rapport with the peole around him, to continue to challenge my arrest.

THE COURT: What was it that you feared and what was your concern?

THE WITNESS: Well, my concern was that myself, my possible prisoner that I was speaking with there, who I have all the liability for at the time that I have him in my custody, my partner and his violator who is liable for while he is holding him at the scene, for our personal safety.

THE COURT: All right. Go ahead.

CROSS-EXAMINATION

BY MR. MANESS:

Q. Mr. Kelley, did you testify in the trial involving Mr. Hill in municipal court?

A. Yes, I did.

Q. And I was Mr. Hill's counsel, was I not?

A. To the best of my knowledge.

Q. Do you recall answering questions that I asked you at that time?

[3-53]

A. I recall that I did.

Q. Do you recall ever having mentioned anything at all about a crowd in your testimony before the municipal court?

A. No, sir.

Q. How many people were in this alleged crowd?

A. As I said before, between fifteen and twenty people, twenty-five.

Q. Were they predominantly male or predominantly female?

A. I don't recall, sir. There was just a lot of people.

Q. Were they predominantly white or predominantly black?

A. I also don't recall.

Q. Where did these people come from?

A. From the area. I don't know, sir.

Q. Did you question any of these people?

A. No, sir.

Q. Did you ask any questions of Mr. Hill concerning these other people?

A. No, sir.

Q. Were these people that were with Mr. Hill, or the

people that had simply gathered there at the scene of your confrontation with Charles Hill?

A. I don't know, sir. As I said, I didn't question them.

Q. Did any of these alleged fifteen or twenty people who gathered at the scene say anything?

A. Not to me, no, sir.

[3-54]

Q. Was there any type of crowd noise? And I mean by that, talking or laughing or anything at all that was distracting from the crowd, other than Mr. Hill?

A. Specific talking that I can recall, no, sir.

Q. Was it a quiet group of people?

A. Not specifically quiet, but not specifically disorderly.

Q. Were these alleged people all massed together as if they were all part of one common group, or were they simply people who appeared to be stopped on the street to watch?

A. They were people that appeared to stop on the street in the exact vicinity of Mr. Hill.

Q. Now, what were they watching?

A. They were watching me.

Q. And your interrogation of Charles Hill; is that correct?

A. It seemed to me to be so.

Q. Was your interrogation of Charles Hill unusual in any manner that you can recall?

A. Other than the fact that Charles Hill was unusual; no, sir.

Q. Did you ever threaten to send Charles Hill to jail?

A. Not that I recall.

Q. Did your partner ever threaten to send Charles Hill to jail?

A. Not that I recall.

Q. Were you carrying anything in your hand?

[3-55]

A. Yes, sir, I was.

Q. What was it?

A. A flashlight. It was nighttime.

Q. Can you describe the flashlight?

A. Yes, sir. It was a battery operated flashlight with an illuminated beam.

Q. And is that flashlight capable of being used as a weapon?

A. It is capable of being used as a defensive weapon, yes, sir.

Q. It is capable of being an offensive weapon, too?

A. In the wrong hands.

Q. Yes, sir. Was your partner carrying a flashlight?

A. Yes, he was.

Q. At the time that the car was initially stopped, was it your partner, Mr. Holtsclaw, who was actually giving the ticket to the driver?

A. Yes, it was.

Q. And I take it, then, that when you first initially saw Mr. Hill, Charles Hill, I mean, that it was you who was questioning while your partner was writing the ticket?

A. Yes, it was.

Q. What's the distance between your partner writing the ticket for the car and the scene where you initially questioned Charles Hill, approximately?

A. Five yards, fifteen feet.

[3-56]

Q. Fifteen feet or so?

A. Yes, sir.

Q. And I believe it was your testimony that after Mr. Charles Hill had given you this driver's license, he then attempted to walk away?

A. Yes, sir.

Q. In which direction did he walk on Westheimer?

A. East.

Q. East on Westheimer. And approximately how far did he walk before you caught up with him?

A. Maybe another ten feet.

Q. Would it be a fair statement to say, then, that at that point, did you physically touch Mr. Hill when you stopped him?

A. Yes, I did.

Q. With one hand, or both hands?

A. With one hand.

Q. And what did you say at that time?

A. I told him to stop.

Q. Was this in a tone of voice loud enough for Mr. Ray Hill to have heard you?

A. I don't know where Mr. Ray Hill was at this time.

Q. I take it up to the time that you directed or ordered Charles Hill to stop, after he had moved approximately fifteen feet east on Westheimer, that you had not heard of

[3-57]

and knew nothing about Ray Hill?

A. That's correct.

Q. Now, was Charles Hill under arrest at the time that you stopped him?

A. That's questionable. I don't really know how some people consider an arrest. I consider that I was detaining him, but under the law, I believe that it's considered that he was under arrest.

Q. Let me rephrase the question. Are you familiar with the distinction between a formal arrest and—

A. He was not formally arrested.

Q. —a stop and frisk situation?

A. He was being detained.

Q. And I take it this was on the basis of his having attempted to help the truck back out of the parking lot onto Westheimer?

A. That's what initiated this.

Q. Now, at the time that you caught up with Mr. Hill some fifteen feet from the initial point of contact, why was he being detained at that point?

A. Well, sir, I still had his identification.

Q. Did you give it back to him?

A. Subsequently, yes.

Q. What happened then, when you caught up with him?

A. I turned him around to find out why he was leaving the

[3-58]

scene of my investigation while I was still speaking with him, why he was leaving his identification behind.

Q. What did he say in answer to that question?

A. I don't recall, sir.

Q. Did he offer an explanation for just walking away?

A. No, sir, he did not. He just kept acting weird.

Q. Well, did he say anything?

A. I don't recall, sir.

THE COURT: Well, did the man seem to be in possession of all of his mental faculties?

THE WITNESS: No, sir.

THE COURT: All right.

THE WITNESS: Not to the extent that I needed to take him into custody, but to the extent that he was in possession fully of his faculties, no, sir.

THE COURT: All right.

Q. (By Mr. Maness) Did your partner ever come over to where you and Mr. Charles Hill were standing?

A. No, sir, I don't believe so.

Q. I take it, then, that your partner never at any time interrogated or questioned Charles Hill?

A. I don't recall, sir. I believe that when I caught up to him, I walked with him back over to where my partner was, or in the close vicinity of where my partner was. Because I didn't want to be that spread out; I didn't want to be that

[3-59]

far away from where my partner was. When on duty, we try not to keep—we try not to keep too much distance between us. We try to stay in the same vicinity.

Q. Would that mean, then, as best you can recall, after you caught up with Charles Hill and questioned him, you then took him back closer to Mr. Holtsclaw and the automobile?

A. Took him back closer to the original area where I was investigating, which was closer to where Officer Holtsclaw was.

Q. Can you ever recall any conversation with Mr. Charles Hill concerning weight lifting?

A. I don't recall. I think later on in our conversation, he told me that he lifted weights and he had a nervous twitch or some type of a muscle spasm disorder, which was the cause of his weird actions.

Q. Do you ever recall having told him that your partner lifted weights and he didn't act as strangely as Charles Hill?

A. I didn't recall that, but—

Q. Does your partner lift weights.

A. Yes, he does.

Q. Is he a fairly large individual?

A. He is well built.

Q. Was he ever involved in the questioning of Charles Hill at any time, at any point?

[3-60]

A. I believe that he may have said something to Charles Hill, but he wasn't involved in the questioning of him in conjunction with the offense.

Q. How far away was Ray Hill at the time he first spoke the words that you testified to?

A. As I said, behind me, probably seven to eight yards.

Q. And what were those words again?

A. The first words that he spoke were, leave him alone, he didn't do anything wrong.

Q. And I believe that you ignored that; is that correct?

A. I did turn to see where it was coming from, and then I did ignore it.

Q. And did you observe Mr. Hill at that point, Mr. Ray Hill?

A. Yes, I did.

Q. Now, at the time Mr. Ray Hill spoke those words to you from approximately seven to eight yards away, had any of the other people who allegedly gathered there in the vicinity of the scene done anything or said anything?

A. Other than just converging in one mass, no sir.

Q. Did you feel apprehensive from these people as opposed to Mr. Hill?

A. I felt apprehensive towards the crowd because of Mr. Hill.

Q. Did you ever direct Mr. Hill or the crowd to leave the

[3-61]

scene?

A. No, I did not.

Q. You didn't then feel so apprehensive that you felt the crowd constituted a threat, either to you or to your investigation?

A. Yes, sir, I did.

Q. Well, why didn't you ask the people to leave then? It a very common phenomenon, is it not, for people to say to crowds at scenes of investigation, will you all please move along?

A. Yes, sir, it is common. But at this point, I wasn't going to get involved in leaving my investigation to tell a crowd of people to move along and possibly incite an ever further disorder.

Q. Well, was the crowd being boisterous or disorderly in any way?

A. No, sir.

Q. Is there any law that you know of against a citizen stopping and watching a police officer stopping and interrogating a witness?

A. No, sir, that's why I didn't tell them to move on.

Q. So they weren't doing anything illegal?

A. Other than converging and being a possible threat to me and my partner.

Q. You say other than that. In your opinion, is that

[3-62]

illegal in any way?

A. No, sir. There are a lot of things that aren't illegal that are a threat to the safety of a police officer.

Q. Now, that's my question, I guess. The crowd, at the time that you first heard the words from Mr. Ray Hill, which were to leave him alone, he didn't do anything—

A. Wrong. He didn't do anything wrong.

Q. Oh, didn't do anything wrong; I'm sorry. Excuse me. The crowd posed a threat to you, but you didn't think that anybody in the crowd was doing anything illegal. Would that be a fair statement?

A. No, sir. A fair statement would be that the crowd was imposing a threat to me and I felt uneasy, I wanted to complete the investigation without interruption, assist my partner in completing his citation, and—

Q. Up to that point, up to the point the first words were spoken, nobody, in your opinion, had done anything illegal?

A. No, sir. I was fixing my attention to Mr. Charles Hill, who I was detaining at that time.

Q. Now, what were you questioning or talking to Mr. Hill about after the first words were spoken by Mr. Ray Hill? You had already made a decision, had you not, to let him go?

A. I don't recall exactly what part of my investigation I was in, sir. But until I released him from the scene, he

[3-63]

was still my responsibility.

Q. I understand that.

A. So I don't recall exactly what we were talking about at the time.

Q. Well, were you at that point talking to him about the traffic situation that you had previously talked to him about?

A. As I stated, sir, I don't recall what I was talking to him about at that time.

Q. Can't recall anything at all about the subject of that conversation?

THE COURT: He recalls the subject of the conversation, but he doesn't recall at what stage he was in, as I understand his testimony.

THE WITNESS: Yes, sir, that's correct.

Q. (By Mr. Maness) We are at the point now, I take it, that Mr. Hill, from seven to eight yards away, says to you to leave him alone, he didn't do anything wrong. What tone of voice did Mr. Hill use?

A. Very loud, very strong voice. A commanding voice. In other words, it wasn't—he wasn't requesting me to leave him alone; he was demanding that I leave him alone.

Q. And you turned around and observed Mr. Hill and turned back to Charles Hill; is that correct?

A. That's correct.

[3-64]

Q. And how much longer, how much more time had expired before the second words were spoken by Mr. Ray Hill?

A. I believe I might have possibly gotten two words out of my mouth, but I believe I just opened by mouth.

Q. Almost instantly?

A. Almost instantly.

Q. And what was the second group of words that were spoken?

A. He said exactly at this point, he said, leave him alone. Why don't you pick on somebody your own size?

Q. Where was Mr. Holtsclaw at that point?

A. He was in the area where I was, sir. I believe he was probably next to me or I believe he was still issuing a citation. A ticket takes quite a while to write. He was probably within five feet of my position; I don't recall exactly.

Q. And what happened then? Did you turn to Mr. Hill and walk toward him?

A. At that point, I turned to Mr. Hill. I didn't walk towards him, but I turned to Mr. Hill and spoke to him.

Q. And I believe he is still seven to eight yards away; is that correct?

A. I would say that's a good estimate.

Q. What did you say to Ray Hill at that point?

A. At that point I said to Ray Hill, I said words to the effect of, excuse me, are you interrupting me in my official

[3-65]

capacity or duty as a Houston police officer? I don't recall if I used capacity. I do recall that I specifically asked him, in a very official type voice, are you interrupting me in my official duties as a Houston policeman?

Q. Why did you say that?

A. I really don't know why I said that. I just know that I wanted to know if that's what he was doing or if he was just acting like he was trying to impress some people in the crowd. I didn't know.

Q. Well, Mr. Kelley, your asking the question implies that you weren't sure whether he intended to interrupt you, does it not? That you were trying to nail him down?

A. No, sir, I wasn't trying to nail anyone down.

Q. But I guess then my question is, your question, excuse me, are you interrupting me in my official duties as a Houston policeman, if it was not designed to establish what his intention or purpose was in speaking to you, why did you ask him the question?

A. Because I wanted to know what his feelings on the matter was.

Q. Did that make a difference in terms of whether or not he had violated the ordinance, in your opinion?

A. It made a difference on whether or not he was baiting me to arrest him or not.

Q. Let me ask you this question, Mr. Kelley. Is baiting a

[3-66]

Houston police officer a crime, in your opinion?

A. If it is, I don't know the ordinance.

Q. The only ordinance that you were aware of that would authorize an arrest for someone for baiting a police officer or taunting him or so forth, would be this ordinance which requires an interruption of an officer during the performance of his official duties?

A. No, sir. I would never arrest someone for the offense, other than the offense they committed, just to be able to arrest them.

Q. Have you ever arrested somebody for disorderly conduct?

A. Yes, sir, but that's a very wide law. There are specific instances in there, disorderly conduct, abusive language, disorderly conduct. There is other elements to that.

Q. Did you regard Mr. Hill's language as abusive?

A. As abusive?

Q. Yes, sir.

A. No, sir.

Q. I take it, then, that you didn't believe there was probable cause to arrest him for disorderly conduct under the provision of the statute that relates to—

THE COURT: I don't believe that statute is involved here, is it? You seem to want to stretch this thing out; you just want to be here all day, Counsel.

[3-67]

MR. MANNESS: No, sir.

THE COURT: Well, let's get to this case and get it over with.

MR. MANESS: I believe these questions are relevant to this case.

THE COURT: Go on.

Q. (By Mr. Maness) I take it, then, that Mr. Hill's language likewise was not threatening to you, other than in the words that you spoke?

A. I don't understand.

Q. Let me rephrase the question. Did he ever imply by any word or gesture that he intended to physically interrupt your interrogation of Charles Hill?

A. Yes, sir, he did.

Q. And how did he do that?

A. When I asked him if he was interrupting me in my official duties as a policeman, he looked directly at me, he placed his hands on his hips and in a very bold manner, said yes. Why don't you pick on somebody my size?

Q. I believe at that point you had left Charles Hill and walked over to Ray Hill; is that correct?

A. At the point that he said yes, he was interrupting

me and challenged me to pick on somebody his size, I started walking toward him, yes, sir.

Q. And just left Charles Hill standing there; is that

[3-68]

correct?

A. Yes, sir. At that point, my biggest concern was Ray Hill inciting this crowd against me and my partner.

Q. Well, Ray Hill didn't say anything to the crowd, did he?

A. He didn't have to; they were with him.

Q. Why is that?

A. Sir, it was just a feeling that I got. I have to act on may feelings out there.

Q. Well, did Charles Hill have anyone with him?

A. I don't recall. I don't think that anyone was directly with him. He was in the middle of the street alone. Whether anybody was with him or not, I don't know.

Q. Do you ever recall seeing a white woman who was with him?

A. Now that you mention it, I recall there might have been a white woman in the area, but I don't recall her being with him; she wasn't in the street with him.

Q. Was she part of the crowd?

A. I don't know, sir.

Q. Now, up to the point where Ray Hill said, allegedly said yes, why don't you pick on somebody your own size, did anybody in the crowd do anything?

A. I don't recall, sir. At that point, I knew that I had to focus my attention on Mr. Hill and to alleviate the possibility of violence.

[3-69]

Q. Did anybody in the crowd attempt to prevent the arrest of Ray Hill?

A. I don't think so. I didn't feel anyone jump me.

Q. Did anyone in the crowd say anything when you arrested him?

A. I am sure they did, sir, but I wasn't focusing my attention on the people in the crowd other than if one of them would have gotten in my way or attempted to grab my gun or my flashlight or me.

Q. But that didn't happen, did it?

A. Not that I recall, no, sir.

Q. Do you think, on the basis of the circumstances, that Ray Hill could have spoken the words he spoke because you were getting ready to beat up Charles Hill?

A. No, sir. He was challenging me.

Q. Well, why?

A. He was challenging me to arrest him.

Q. To arrest Ray Hill?

A. Mr. Ray Hill was challenging me and baiting me to arrest him.

Q. Officer Kelley, if I challenge you right now to arrest me, will you do that?

THE COURT: That's argumentative. It contributes absolutely nothing. It is the difference in being in this Courtroom and being out there in Montrose, which is an

[3-70]

entertainment area, late at night where a lot of bars and a lot of clubs are, and under the circumstances he mentioned, he said he was apprehensive about it and thought the crowd might get disruptive.

Q. (By Mr. Maness) Doy you draw any distinction in your own mind, Mr. Kelley, between actual or threatened conduct as an interruption under this ordinance, and words alone?

A. Do I draw a distinction? Yes, sir. They are different, but in my mind, I have to be aware of everything around me and the possibility of something escalating into something else.

Q. I guess what I'm asking you is, as far as you are concerned, there is no problem in arresting someone for merely speaking words, so long as in your judgment and in your opinion, the speaking of the words constitutes an interruption of your investigation?

A. If the speaking of the words constitutes all of the elements that I need to make the case in which I am very fully satisfied that I could have, then no, sir.

Q. I guess my question, to make a case for interrupting a police officer, you have to be involved in an investigation?

A. Yes, sir.

Q. You have to be a police officer?

A. That's correct.

Q. And you have to be interrupted?

[3-71]

A. That's correct.

Q. Now, on the basis of what you just said, I take it that it's your view that words as well as actions or threatening conduct constitute an interruption under the ordinance?

A. They can, sir, but I can tell you I have written many citations and conducted many investigations and been interrupted thousands of times, and not taken someone to jail. Because it is not—it was not warranted at the time.

THE COURT: Well, how many times have you charged people under this ordinance?

THE WITNESS: I believe Mr. Hill was the first, and I believe I made one other arrest in my two and a half years.

THE COURT: All right.

Q. (BY Mr. Maness) Do you remember a lady named Heller?

A. Yes, sir, I do, as a matter of fact. I arrested her for interrupting, but I did not arrest her for interrupting me. I was called to the scene where some officers had been making an investigation and were having problems. I was called to assist and when I arrived, I was told that she had interrupted them and I—

Q. How?

A. I don't recall, sir. I transported her for them and I signed the complaint.

Q. You signed the complaint, but you don't recall how she

[3-72]

interrupted the officers?

A. Well, sir, it wasn't my place to make that case, because at the bottom of the complaint, it just states that I the above signed have knowledge that the offense did occur. And when another police officer tells me that the offense occurred, I can sign that complaint.

Q. Certainly; I understand that. I guess what I am asking—

A. No, sir, that was not my case. I signed the complaint, but it was not my arrest.

Q. And you can't recall what you put in the blank space that said interrupting a police officer by, and then blank?

A. No, sir, I can't.

Q. Okay.

THE COURT: And whatever you put would have been what you were told by someone else?

THE WITNESS: That's correct, sir.

THE COURT: All right.

THE WITNESS: Another police officer.

Q. (By Mr. Maness) Have you ever had any experience or training or education from a superior officer, for example, when you were in your probationary period as a police officer, with respect to how to prepare complaints? And I am referring now specifically to municipal court complaints of the sort that are used to charge the offense of interrupting

[3-73]

a policeman.

A. Yes, sir.

Q. How do you know what to put in the blank space?

A. Well, I know that you can't exceed the blank space that's left for you to use, and when you are given an ordinance like interrupting, you are given one small line to write it on. You have to be very concise and you have to be pretty picturesque in one small line, to be able to get your point across. It is very difficult to explain what Mr. Ray Hill—in inciting a crowd that threatened me and my partner, to put it in one small line. So I had to use my best artistic ability in puttinng in that line.

Q. And the words you used were verbal challenge?

A. That's correct.

Q. And he wasn't inciting a riot, was he?

A. No, sir. If he was inciting a riot, I am sure there would be an ordinance on a much higher level that would have been used.

Q. And in fact, the words that he spoke at all times were directed to you, and to the best of your knowledge, not to anybody in the crowd?

A. That's correct, but I am sure a lot of these other people heard them and they probably, you know, concerned a lot of other individuals.

THE COURT: I think what you are trying to say is

[3-74]

you were concerned the situation might escalate?

THE WITNESS: That is correct, sir.

THE COURT: Into something worse than it was at that moment?

THE WITNESS: That's correct.

THE COURT: So you took action to cut it off at the pass before it got out of hand?

THE WITNESS: That's correct.

THE COURT: Just a judgment on your part?

THE WITNESS: I had to make a decision and I did what I thought was right.

MR. MANNESS: Pass the witness.

MR. CRAWFORD: No further questions.

THE COURT: May this witness be excused?

MR. CRAWFORD: Yes, Your Honor.

THE COURT: All right, sir. You are free to go about your business. Thank you very much.

* * *

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APPELLANT'S

BRIEF

Supreme Court, U.S.
FILED
DEC 2 1986
CLERK

NO. 86-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE APPELLANT

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December 1986

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QUESTIONS PRESENTED

I. Whether a federal court should entertain a facial challenge to an ordinary core criminal conduct ordinance, where the plaintiff's actions are constitutionally proscribable conduct, and the ordinance is not being used as an instrumentality of prior restraint, and further where the ordinance in question is not substantially overbroad.

II. Whether a federal court should invalidate a municipal ordinance on the basis of facial overbreadth where the ordinance may be judicially limited.

III. Whether a federal court should abstain from deciding a constitutional challenge to a municipal ordinance where the state courts have not construed that ordinance.

IV. Whether the Court of Appeals erred in making independent findings of fact that contradicted those of the District Court.

LIST OF PARTIES

The appellant is the City of Houston.

The appellee is Raymond Wayne Hill.

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On Appeal From The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the District Court (Jurisdictional Statement [hereinafter "J.S."], App. B) is not reported. The panel opinion of the Court of Appeals is reported at 764 F.2d 1156. The *en banc* opinion of the Court of Appeals (J.S., App. A) is reported at 789 F.2d 1103.

JURISDICTION

The *en banc* judgment of the Court of Appeals (J.S., App. C) was entered on May 14, 1986, and issued as mandate on June 5, 1986. The City of Houston filed its notice of appeal on July 25, 1986, and its Jurisdictional Statement on August 12, 1986. The Court noted probable jurisdiction on October 6, 1986. ____U.S.____, 107 S. Ct. 58. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

3. Code of Ordinances of the City of Houston § 34-11(a) (1968) (uncodified but saved from repeal by Ordinance No. 85-1380):

"§ 34.11. Assaulting or interfering with policemen.

(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."

4. Texas Penal Code, §§ 6.02 - 6.03:

"§ 6.02. Requirement of Culpability

(a) Except as provided in Subsection (b) of this section, a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility.

(d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

(1) intentional;

(2) knowing;

(3) reckless;

(4) criminal negligence.

(e) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged.

§ 6.03. Definitions of Culpable Mental States.

(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(d) A person acts with criminal negligence, or is criminally negligent, with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint."

STATEMENT

In this case, Raymond Hill challenges *in toto* the constitutionality of a City of Houston ordinance that, essentially, makes it a misdemeanor of the lowest class, punishable by fine only, to interfere with a police officer in the exercise of his duties. Although not challenging the trial court's finding that the ordinance was not applied unconstitutionally as to him, Hill asserts the right to attack the ordinance on the basis of overbreadth and thus to have it invalidated on its face.

The case was initiated in the United States District Court for the Southern District of Texas, seeking injunctive and declaratory relief and damages under 42 U.S.C. § 1983. That court, sitting without a jury, found the ordinance constitutional in all respects and denied all relief (J.S. App., p. B-13). A divided panel of the United States Court of Appeals for the Fifth Circuit reversed. 764 F.2d 1156 (1985). The Court of Appeals granted *en banc* review but, in an 8-7 decision, again reversed the district court (J.S. App., p. A-1).

1. The case arose from an arrest of plaintiff Raymond Wayne Hill by Houston police officers for violating Houston Code of Ordinances § 34-11(a) (1968), which provides:

> Sec. 34-11. *Assaulting or interfering with policemen.*
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

The evidence at trial showed that on February 14, 1982, Officers Kelley and Holtsclaw were patrolling the 500 block of Westheimer (Joint Appendix, hereinafter

"J.A.", p. 51). While Officer Holtsclaw was issuing a traffic citation to an individual not related to this case, Officer Kelley observed another individual impeding traffic on Westheimer, a very heavily traveled street (J.A., p. 52). This individual, Charles Hill (no relation to Raymond Hill), was standing in the middle of the traveled portion of the roadway attempting to stop cars and a bus (*id.*). In an attempt to ensure the safety of the individual and an orderly flow of traffic, Officer Kelley asked Charles Hill to stop directing traffic and to come over to the sidewalk, which he did (*id.*).

Officer Kelley asked for Charles Hill's identification and began talking to him and warning him that such actions were hazardous to his safety and the flow of traffic (J.A., p. 54). Officer Kelley stated that at the time he was talking to Charles Hill, he was conducting an investigation into his actions, and trying to decide whether to issue a citation (*id.*).

While Officer Kelley was speaking to Charles Hill, the latter began acting erratically (J.A., p. 56). Charles Hill's mind apparently began to wander, and he started to walk away (*id.*). Officer Kelley, who was still holding Charles Hill's official identification card and conducting his investigation, told him to stop and come back (J.A., p. 57). Charles Hill did not obey, and Officer Kelley put one hand on his shoulder to turn him around (J.A., pp. 65-66).

At this point, Officer Kelley observed a crowd forming, which made him feel uneasy and threatened (J.A., p. 70). From that crowd he heard someone yell to him from behind to leave Charles Hill alone (J.A., p. 54), that he hadn't done anything wrong (J.A., p. 55). Officer Kelley looked around and observed the man who had

shouted this at him, though he did not at that time know that he was the plaintiff, Raymond Wayne Hill (J.A., p. 51).

Officer Kelley turned back to Charles Hill and continued speaking to him. However, Raymond Hill, who next spoke "more loud[ly]" and "more boisterous[ly]" (J.A., p. 58), addressed Officer Kelley: "I said, leave him alone. Why don't you pick on somebody your own size?" (*id.*). In response to this, Officer Kelley, again having to ignore his investigation, turned toward Raymond Hill and said, "Are you interrupting me in my official capacity as a Houston police officer?" (*id.*). Raymond Hill, putting his hands on his hips, responded, "Yes. Why don't you pick on somebody my size?" (*id.*).

Officer Kelley testified that at this point he was concerned about the possibility of violence (J.A., p. 75). Furthermore, since Raymond Hill had said he was interrupting him, challenging him and baiting him into an arrest, and because of the fear that Raymond Hill would incite the crowd (*id.*), Officer Kelley arrested Raymond Hill (J.A., p. 58). Hill was later tried and found not guilty of the offense (J.A., p. 3).

Additional evidence introduced at the trial showed that Raymond Hill had been arrested two times before this incident for violating the ordinance, and hence was knowledgeable of its existence (J.A., p. 7).

2. Raymond Hill filed this lawsuit on April 28, 1982, challenging the constitutionality of § 34-11(a). On February 16, 1984, the District Court, the Honorable James DeAnda presiding, entered its Findings of Fact and Conclusions of Law (J.S., App. B). The Court held that the ordinance was constitutional as applied to Hill because

"Plaintiff was clearly engaged in intentional conduct which violated the ordinance since his verbal assaults were meant to interrupt an on-going police investigation" (J.S. App., p. B-2). The Court also found no evidence, relating to the disposition of this type of case, indicating that the ordinance is used to make improper or illegal arrests (J.S. App., p. B-3), and concluded that there was no basis to find it facially invalid.

The Court of Appeals panel, in an opinion by the Honorable Alvin B. Rubin, reversed the decision of the District Court on the ground that the ordinance is substantially overbroad and thus unconstitutional. 764 F.2d 1156, 1164. The Honorable Patrick Higginbotham dissented. 764 F.2d at 1165. Upon review *en banc*, the Court of Appeals, in an opinion by Judge Rubin, held that the ordinance is substantially overbroad and unconstitutional (J.S. App. A). Judge Higginbotham, joined by six other judges of the Court of Appeals, dissented (J.S. App., p. A-25).

SUMMARY OF THE ARGUMENT

The majority below erred in concluding that there is a substantial likelihood that the continued existence of the Houston ordinance will deter constitutionally protected activity. This conclusion rests upon inappropriate findings of fact by a court of appeals and, more importantly, upon a misapplication of the law regarding facial attacks based upon alleged overbreadth.

1. A plaintiff should not be able to place the existence and enforcement of a core criminal conduct ordinance in jeopardy where, as with Ray Hill, his own conduct is of the sort that a state or city can constitutionally prohibit and where, as here, the ordinance is not being used as a

vehicle for prior restraint. Current overbreadth doctrine turns the concept of standing on its head, for it allows a plaintiff such as Hill, who cannot show that the ordinance was unconstitutionally applied to him, to bring a facial challenge on behalf of others, while a plaintiff who is *successful* in his personal challenge can have the ordinance declared invalid only as applied to him and cannot pursue a facial attack.

Allowing Hill to bring a facial challenge and, if successful, to invalidate an ordinance *in toto* does not serve the purpose for which the overbreadth doctrine was fashioned—to quell the chilling effect upon those whose constitutionally *protected* conduct may be deterred by the overbroad reaches of the ordinance. The interests of free speech *and* local law enforcement would *both* be served by limiting facial challenges to (i) statutes that directly regulate protected conduct and thus are not "core criminal conduct statutes," and (ii) core criminal conduct statutes that are being used in bad faith or as instrumentalities of prior restraint.

Even under the *jus tertii* exception that allows Hill, whose conduct can be constitutionally proscribed, to assert the rights of others whose conduct cannot be prohibited, the majority below erred in concluding that the Houston ordinance is *substantially* overbroad and cannot stand. Hill was charged under a valid "criminal conduct ordinance," not one directed primarily at expressive speech or conduct. Moreover, the ordinance has not been unconstitutionally applied to him or to others. Hill's activities were conduct, not pure speech, thereby placing this case squarely within *Broadrick v. Oklahoma*.

Under *Broadrick*, overbreadth claims, if entertained at all, are to be curtailed where otherwise valid criminal

laws are sought to be applied to conduct. The function of an overbreadth challenge—to guard against the chilling effect of an overbroad law—is less compelling where conduct, rather than pure speech, is involved.

Thus, consistent with *Broadrick*, the Houston ordinance cannot be invalid on its face unless it is *substantially* overbroad. The ordinance, if overbroad at all, is not *substantially* overbroad because it addresses a core area of constitutionally permissible governmental concern—law enforcement—that dwarfs any hypothetical and incidental effect upon free expression. As stated by the dissent below, the ordinance "does not seriously and manifestly threaten the constitutionally protected conduct of anyone."

Therefore, any impact on the exercise of First Amendment rights is marginal and not substantial. Since Hill cannot show *substantial* overbreadth, the *jus tertii* standing exception should be unavailable to him. The ordinance is constitutional as applied to his clearly unprotected conduct, and he cannot assert the constitutional rights of other unidentified persons not before the Court.

2. Even if Hill could show that the Houston ordinance is substantially overbroad as written, the doctrine of facial overbreadth cannot be invoked where a constitutionally acceptable, limiting construction can be placed on that ordinance to cure the overbreadth objection. The Houston ordinance has never been construed by a state court, quite possibly because, in its many years on the books, no person felt threatened by its existence in the exercise of his constitutional rights.

The procedures for appeal, in the Texas court system, readily provide for a review of the ordinance and offer an

opportunity for the state courts to adopt a constitutionally limiting construction of the ordinance. Such a valid construction can easily be reached. The most obvious limiting construction would add an intent requirement to the ordinance—a requirement that is already an unstated element of the ordinance because of a specific provision of the Texas Penal Code. A federal court can fashion possible limiting constructions, not in order to substitute its judgment for that of the state courts, but in order to determine whether the ordinance is so overbroad that no reasonable limiting reading is possible. Several such limiting constructions of the Houston ordinance are readily apparent. Hence, under *Broadrick v. Oklahoma*, Ray Hill cannot invoke the substantial overbreadth doctrine.

3. In view of the considerations enunciated in *Railroad Commission of Texas v. Pullman Co.*, the federal courts should abstain from deciding a constitutional challenge to a municipal ordinance where the ordinance has never been, but could be, construed by the state courts. Abstention should apply in this case because of comity and federalism; avoidance of constitutional adjudication where possible; and deference to local expertise.

State courts should normally be given the first chance to construe a state or local law. Such deference is implicit in a federal system. Federal courts should assume, absent specific evidence to the contrary, that state courts will act within the bounds of the constitution.

State courts are better equipped to rule, in the first instance, on local ordinances. For example, had state courts ruled first on the Houston ordinance, they could have applied Texas law and its express *mens rea* requirement and avoided a ruling on the constitutionality of the ordi-

nance. Review by the state courts can, in many instances result in the circumvention of any constitutional issues, a cardinal principle of federal court review.

The interests of federalism here overweigh any negative consequences flowing from abstention. There has been no showing of a chilling effect on anyone, during the ordinance's long existence. The penalty for violation of the ordinance is minimal. The law regulates criminal conduct, not the content of a person's speech. It is needed to assist in legitimate law enforcement in the City of Houston. The absence of state-court challenges should hardly be used as an excuse for a preemptive strike, in the federal courts, against the ordinance's very existence.

4. The majority below erred in substituting its findings of fact for those of the trial court. The trial court's finding that the Houston ordinance was not being applied unconstitutionally was not clearly erroneous. Under Rule 52(a), the Court of Appeals is prohibited from indulging in independent fact finding.

The judgment of the court below should be reversed, and that of the trial court affirmed.

ARGUMENT

I. A Federal Court Should Not Entertain a Facial Challenge to an Ordinary Core Criminal Conduct Ordinance Where the Plaintiff's Actions Are Constitutionally Proscribable and the Ordinance Is Not Being Used as an Instrumentality of Prior Restraint.

Ray Hill does not challenge, on appeal, the trial court's finding that the questioned ordinance has not been unconstitutionally applied to him (or, for that matter, to

anyone), as the court below recognized (J.S. App., p. A-9). Moreover, it is beyond serious doubt that Hill's conduct was well within the core area of conduct which the City of Houston, or any other jurisdiction exercising law enforcement powers, undeniably may prohibit by ordinance.

Where a plaintiff's own activities enjoy no hint of constitutional protection, the essential question is whether that plaintiff, unable to show that the ordinance has been unconstitutionally applied to him, should be permitted to assert that the ordinance is overbroad in that it infringes upon the First Amendment rights of others. The proper answer is that the First Amendment exception that allows *jus tertii* standing for overbreadth challenges should be inapplicable where the plaintiff is charged under a legitimate core criminal conduct statute that is not aimed at, or utilized for, inhibiting free expression.

Permitting such a person to claim overbreadth subverts the principles of judicial restraint and federalism, unduly ties the hands of local officials, and fails to serve the interest for which the overbreadth doctrine was fashioned, which is to avoid the inhibitory effect upon those who fear prosecution under statutes or ordinances susceptible of application to protected expression. Even if *jus tertii* standing is available to Hill, his facial challenge should fail, because the Houston ordinance, if overbroad at all, is not *substantially* overbroad.

A. The Houston Ordinance Is Designed to Prohibit Core Criminal Conduct, Such As the Plaintiff's, and Has Not Been Used as An Instrumentality of Prior Restraint.

Ray Hill, without provocation, willfully interfered with the lawful conduct of a police officer engaged in a

necessary peacekeeping function. Hill did so after fair warning that he was interfering, and with intimate actual knowledge of the criminal ordinance in question. Not only was his challenge to Officer Kelley the sort of specific conduct that may be subject to sanction, but it was also the type of activity that falls generally into a broad type of conduct that interferes with a vital governmental function—law enforcement. Any balancing of interests between this type of unprotected conduct and governmental concerns weighs clearly with the state.

It is well established that the City's interest in facilitating law enforcement is a legitimate state interest. *Colten v. Kentucky*, 407 U.S. 104 (1972). An ordinance prohibiting assaults upon, and interference with, public officers serves the very essence of that interest.

The trial court found that the ordinance has been enforced constitutionally and used for its intended purpose, and Hill does not challenge such findings on appeal. Specifically, the court found that Hill's arrest "was not made for purposes of harassment" (J.S. App., p. B-3); that there was "no evidence relating to the disposition of this type of case which shows that the ordinance is used to make improper or illegal arrests" (*id.*); and that arrests are not "made in bad faith or for purposes of harassment" (J.S. App., p. B-8).

Thus, the Houston ordinance is what may be termed a "core criminal conduct ordinance" whose primary focus —as written and as applied to Hill— is on directly deterring harmful conduct. The trial court below refers to it as a " 'prohibitive' type of statute or ordinance" (J.S. App., p. B-12). Such ordinances are "ordinary criminal laws

. . . that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). They can be distinguished, generally speaking, from laws more specifically tailored to regulate or control expressive activity, e.g., laws regulating charitable solicitations or requiring permits for parades.

The distinction is critical to a proper analysis of the constitutional overbreadth doctrine. This Court has focused upon the legitimate interest in law enforcement even where "speech" was implicated and has had no difficulty in upholding criminal conduct statutes that are properly drawn. In *Colten v. Kentucky*, 407 U.S. 104 (1972), in many respects quite similar to the instant case, the Court upheld a conviction under a disorderly conduct statute where the defendant insisted upon remaining at the scene of a traffic ticket and engaged the issuing officer in conversation, claiming the right to assist and advise the driver and his passengers:

> The State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible *interference or interruption from bystanders*, even those claiming a third-party interest in the transaction. Here the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident.

Id. at 109 (emphasis added).

Hill's actions here were cause for even greater concern than in *Colten*, for the risk was not only that he was impeding the officer's efforts to clear an intersection for traffic pur-

poses but also that Hill's inflammatory words and actions would cause a potentially unruly crowd to get out of hand. As observed by the dissent below, "the first amendment neither authorizes nor protects from subsequent prosecution anti-government vigilante actions of this kind" (Jur. St., p. A-40), and "the Constitution does not require an officer to adopt a 'wait and see' attitude when threats interrupt an investigation or arrest" (*id.*, p. A-39).

The concept of a core criminal conduct statute was carefully enunciated, but in different terms, in *Cameron v. Johnson*, 390 U.S. 611 (1968), which challenged Mississippi's anti-picketing law as overbroad. The Court noted that certain criminally proscribable activity, "even though intertwined with expression and association . . . , bears no necessary relationship to the freedom to . . . distribute information or opinion." *Id.* at 617, *quoting Schneider v. New Jersey*, 308 U.S. 147, 161 (1939). A core criminal conduct statute can therefore be defined as "a valid law dealing with conduct subject to regulation so as to vindicate important interests of society . . . ." *Cox v. Louisiana*, 379 U.S. 559, 564 (1965).

Certainly, then, the Houston ordinance is a valid core criminal conduct law. Apart from the question of whether it is impermissibly overbroad, Ray Hill's misdeeds fall squarely within the core of conduct which a properly drawn statute, or ordinance, may legitimately define as criminal. Moreover, the ordinance has never been used as a subterfuge to control or dissuade free expression. These factors warrant special consideration in devising principles of overbreadth analysis.

B. First Amendment Interests Are Not Materially Advanced by Permitting Third-Party Facial Challenges to a Criminal Conduct Ordinance That Has Not Been Used To Deter Protected Conduct.

The overbreadth doctrine was derived as "an exception to the usual rules governing standing," *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965), for the salutary purpose of obviating the chilling effect upon free speech that may result where "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute suspectible of application to protected expression." *Gooding v. Wilson*, 405 U.S. 518, 521 (1972).

> By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation on the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation.

Dombrowski v. Pfister, 380 U.S. at 487.

Thus, in the First Amendment arena, a limited exception is recognized to the maxim that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). But it must be remembered that the First Amendment exception was created, not out of any desire *per se* to widen the availability of standing, but out of a special concern for the "chilling effect" that the existence of the statute might have on others not before the court.

The *jus tertii* exception permits a person as to whom a statute has been constitutionally applied—and who

therefore cannot claim a constitutional violation for himself—to assert that the statute is "overbroad" in that, by its terms, it includes the hypothetical conduct of other persons, which conduct is protected under the First Amendment. The overbreadth doctrine was brought into clear focus in *Broadrick v. Oklahoma,* 413 U.S. 601 (1973).

In *Broadrick,* the plaintiffs challenged the constitutionality of a state statute restricting the political activities of state employees. Thus, like the instant case, *Broadrick* involved conduct and not merely pure speech. Recognizing that "application of the overbreadth doctrine . . . is, manifestly, strong medicine [and] has been employed by the Court sparingly and only as a last resort," *id.* at 613, the Court noted, significantly, that overbreadth claims, "if entertained at all, have been curtailed when invoked against ordinary criminal laws [i.e., "core criminal conduct laws"] that are sought to be applied to protected conduct." *Id.*

The *Broadrick* Court also emphasized that the *function* of an overbreadth challenge—to guard against inhibitions on free speech—attenuates as the behavior moves along a spectrum from pure speech toward conduct that is covered by "otherwise valid criminal laws [again, "core criminal conduct laws"] that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Id.* at 615.

Clearly, in the context of *Broadrick,* Ray Hill may not invoke the overbreadth doctrine to assert the constitutional rights of others. This is because, in the first place, the Houston ordinance to which Hill was subject is nothing more than an ordinary core criminal conduct law, aimed at preventing socially harmful activity that falls

well within what a later overbreadth opinion termed the "core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, ____, 104 S. Ct. 2839, 2852 (1984).[1] Thus, the ordinance is not aimed in any way at the exposition of ideas.

Second, the ordinance, both as written and as applied to the populace at large, regulates conduct, not pure speech. Thus, it is the effect on the officer, who is "interrupted" or "molested," rather than the content of any utterance connected with the unlawful conduct, at which the ordinance is aimed. The ordinance, in a word, is noncensorial, and has never been used as a direct or indirect means of inhibiting free expression or regulating conduct. The fact that the ordinance has never been used as an intrumentality, or excuse, to practice prior restraint easily sets it apart from the statutes under review in *Dombrowski v. Pfister,* 380 U.S. 479 (1965), and *Edwards v. South Carolina,* 372 U.S. 229 (1963).

In *Cameron v. Johnson,* 390 U.S. 611 (1968), the Court explained the importance of determining whether a criminal conduct law is being enforced in "good faith," rather than as an excuse to regulate protected expression. *Id.* at 618-19. It distinguished *Dombrowski* as "a case presenting a situation of the 'impropriety of [state officials] invoking the statute in bad faith to impose continuing harassment in order to discourage appellants' activities * * * .'" *Id.* at 619, *quoting Dombrowski,* 380 U.S. at 490. As the trial court found, no such factor is present here. *See* J.S. App., pp. B-3, B-8.

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1. *Accord, United States Civil Service Commission v. Letter Carriers,* 413 U.S. 548, 580-81 (1973); *Parker v. Levy,* 417 U.S. 733, 760 (1974); *New York v. Ferber,* 458 U.S. 747, 770 n. 25 (1982).

Finally, but of absolutely central importance, Ray Hill cannot utilize the overbreadth doctrine because any overbreadth in the Houston ordinance is not *"substantial* overbreadth" as discussed in *Broadrick*. In that case, the Court was mindful that to allow a plaintiff whose own misconduct was plainly *unprotected* to strike down an entire statute because it is "overbroad" and might apply to the hypothetical *protected* conduct of others is a big step indeed, and has undesirable side effects:

> The consequence of our departure from traditional rules of standing in the First Amendment area is that any enforcement of a statute thus placed at issue is totally forbidden until and unless a limiting construction or partial invalidity so narrows it as to remove the seeming threat or deterrence of constitutionally protected expression.

413 U.S. at 613.

Mindful that the only justification for the existence of the overbreadth doctrine is to quell the "chilling effect" on protected speech, *Broadrick* reasons that although a criminal conduct law may inhibit such speech "to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." *Id.* at 615.

In other words, the state's interest in enforcing its own criminal conduct laws must be weighed against the "chilling effect" potential. According to *Broadrick*, the state's interests will prevail unless "the overbreadth of a statute [is] not only . . . real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* Insubstantial overbreadth means insubstantial (or non-

existent) chilling effect, in which case the justification for the *jus tertii* exception is lost and should not apply.

Such is the case with the Houston ordinance. The ordinance addresses a core area of local governmental concern; it is non-censorial; it is aimed at conduct, not speech; and there is no showing that it results in any substantial chilling effect. In the words of the dissent below, "the potential reach of this ordinance does not seriously and manifestly threaten the constitutionally protected conduct of anyone; certainly it does not present so grave a threat that we must strike it down as *substantially* overbroad (J.S. App., p. A-52, emphasis in original).

This same thread—the idea that an offending plaintiff may invalidate a criminal conduct statute *in toto* only where the overbreadth (and hence the potential chilling effect) is substantial and outweighs the legitimate governmental interest—runs through the post-*Broadrick* cases but usually is expressed in different terms. The reasoning is especially useful to the extent that it focuses on the fact that overbreadth challenges should be permitted only where there is a real and substantial deterrent impact upon protected expression, rather than focusing upon jurisprudential, and at times cumbersome, analyses of standing and jurisdiction.

In *Ferber v. New York*, 458 U.S. 747 (1982), the Court explicitly noted that the "strong medicine"[2] of an overbreadth challenge is directly tied to, and justified only by, the reality of a chilling effect:

> The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine.

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2. *Broadrick*, 413 U.S. at 613.

> While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.

Id. at 722 (footnote omitted). In other words, the less overbroad the statute, the less is the chilling effect.[3]

In *Ferber*, the requirement of substantiality was applied even to "pure" speech. The case was an overbreadth challenge to a state statute prohibiting persons from knowingly promoting a sexual performance of a child by distributing material depicting such a performance. The statute was admittedly overbroad in that it prohibited, for example, medical and educational uses of the described materials.

The court upheld the statute, despite its overbreadth, on the ground that protection of children from obscenity is a special and particular area of state concern. In a word, the court found the state's interest "compelling," 458 U.S. 757, *citing Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), justifying "special treatment." 458 U.S. at 757. Therefore, the Court concluded that in such a case of overriding state interest—there, the protection of children—"the balance of competing interests is clearly struck," and the materials should not be accorded First Amendment protection. *Id.* at 764.

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3. "'A substantial overbreadth rule is implicit in the chilling effect rationale. . . . [T]he presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable.' Moreover, '[w]ithout a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.' Note, [The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 859 & n. 61 (1970)]." *Ferber*, 458 U.S. at 772 n. 27.

The reasoning in *Ferber* is sound, and should be applied here. Like the statute in *Ferber*, the Houston ordinance is a "paradigmatic case of a state statute [here, a city ordinance] whose legitimate reach dwarfs its arguably impermissible applications." *Id.* at 773. The Court concluded that the substantial overbreadth test of *Broadrick*—"[t]he premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications"—should apply.

Implicitly, the Court appeared to be noting that the specific activity prohibited by the statute in *Ferber* was the "harmful *employment* of children," *id.* at 771 (emphasis added), not the expressive conduct itself. Similarly, the aim of the Houston ordinance is to prohibit *interference* with a police officer, not to prohibit *per se* any speech or conduct that may incidentally cause that interference. Thus, under the analysis in *Broadrick* and *Ferber*, the Houston ordinance should be upheld as against a claim of substantial overbreadth.

Houston's ordinance helps insure that peace officers may be free from harassment in those hundreds of incidents each day, in a large city, in which they engage themselves in protecting the physical safety and well-being of others and of themselves. Utterances directed at them in an effort to prevent them from performing their sworn peacekeeping duties will rarely constitute the sort of expression of ideas which the First Amendment is designed to protect, and those expressions, if entitled to constitutional recognition at all, surely rank low in the hierarchy of free speech values when the constitu-

tional balance is struck between state interest and individual expression.

C. The Court Should Not Recognize an Overbreadth Challenge Brought by a Person Charged with Violating a Bona Fide Criminal Conduct Statute That Is Not Being Used To Prohibit Protected Conduct.

As stated hereinabove, the First Amendment exception that permits a person to challenge and, if successful, to strike *in toto* a statute as overbroad, even though its reach is constitutional as to him, was fashioned in order to pretermit the chilling effect presumably inherent where a "statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, ____, 104 S. Ct. 2839, 2847 (1984). That formulation is too broad, however, where it accords standing to a party who, like Hill, attacks a core criminal conduct ordinance and whose only "standing" qualification is that he is charged under the statute, but who either does not even assert that it is overbroad *as to him* or who, although he makes a personal overbreadth claim, is guilty of conduct that falls within the "core of easily identifiable and constitutionally proscribable conduct that the statute prohibits." 104 S. Ct. at 2852.

The flaw in such an approach is that it turns the traditional concept of standing on its head. It allows a person whose conduct the court concludes is *not* constitutionally protected to proceed to levy a facial attack on behalf of others and, if successful, to have the statute stricken *in toto*, while the person who shows that the law

is unconstitutional as applied *to him* must stop there. *See Munson*, 104 S. Ct. at 2858 (REHNQUIST, J., dissenting). This result defies logic, for it permits only a person whose conduct is *unprotected* to assert the First Amendment rights of persons whose conduct is *protected*.

If this view is to prevail, there is no particular reason to limit First Amendment overbreadth standing to those whose conduct is constitutionally proscribed by the statute. Instead, the interests of persons suffering from any potential "chilling effect" could be presented just as well, if not better, by roving private attorneys general taking up the cause for their fellow citizens, rather than by persons who stand accused of core criminal conduct. If concern regarding a potential chilling effect were absolutely paramount, this view might prevail. Of course, it would eviscerate any remnant of the traditional rules of standing in First Amendment litigation, would ignore Article III concerns, and is not recommended.

The better view is that the "chilling effect" concern *and* the usual rule of standing can *both* be accommodated by providing that a party charged under a *bona fide* criminal conduct statute cannot, by virtue of the technical standing conferred upon him by the mere fact that he was touched by the ordinance, vindicate the free-speech rights of others when the statute's reach as to him has nothing to do with the First Amendment. Of course, in testing the *bona fides* of the ordinance, its actual application, in addition to its initial thrust or intent, should be considered. If a statute —such as that in *Dombrowski v. Pfister* or *Edwards v. South Carolina*—is written to prohibit core criminal conduct but is being used as an instrumentality for prior restraint, it would not qualify as a *"bona fide* criminal conduct statute" under the proposed formulation.

Concern for the "chilling effect" would still be addressed under such a rule. *Jus tertii* standing, and hence a facial challenge, would be available in those cases in which the likelihood of a chilling effect is real: first, where a statute is not a core criminal conduct law but instead directly regulates protected conduct; and second, where a statute, although written to deter core criminal conduct, is actually being used to inhibit free expression.

The result of such a formulation would be to shift the focus of overbreadth standing away from criminal conduct statutes, where it is least useful and least related to free-speech interests, and towards statutes, ordinances, and licensing schemes that directly regulate and have an impact upon free expression and are more likely to inhibit protected conduct.

A further advantage to this approach is that it would encourage local officials to concentrate their efforts on those whose conduct is clearly within the "core area" of objectionable, unprotected activity, since such persons would not be able to assert an overbreadth challenge that could result in striking the entire statute. If a statute, as written and as enforced, addresses only core criminal conduct, challenges to it would be, properly, on a case-by-case basis, and local enforcement efforts would not be stymied by facial challenges. *See,* e.g., *Norwell v. City of Cincinnati,* 414 U.S. 15 (1973).

The foregoing analysis addresses the concerns raised by various members of the Court in *Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S. Ct. 2839 (1984), a suit challenging, on overbreadth and other grounds, a state statute placing a

percentage limitation on charitable fundraising expenses. The majority in *Munson* views substantial overbreadth as a test "to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner." 104 S. Ct. at 2851. Where the statute "covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . , the Court has required a litigant to demonstrate that the statute 'as applied' to him is unconstitutional." *Id.* Thus, a litigant whose conduct is constitutionally unprotected and who cannot demonstrate *substantial* overbreadth cannot have the statute stricken *in toto.*

The dissenting Justices, on the other hand, question the continued desirability of the overbreadth doctrine: "One might as a matter of original inquiry question whether an overbreadth challenge should ever be allowed, given that the Declaratory Judgment Act and the availability of preliminary injunctive relief will usually permit a litigant to discover the scope of constitutional protection afforded his activities without subjecting himself to criminal prosecution." *Id.* at 2858 (REHNQUIST, J., dissenting). Noting that the doctrine is to be used sparingly, the dissent adds, "[W]e are hesitant to paralyze the legitimate enforcement efforts of the States based solely on predictions as to potential chill." *Id.*

Even where the substantiality test is employed, such "predictions as to potential chill" must be indulged in by a reviewing court, under the current overbreadth standard. If, instead, the availability of overbreadth attacks were limited to (i) statutes aimed at expressive conduct rather than prohibiting core criminal conduct, and (ii) core criminal conduct statutes that are being

used as a subterfuge to chill or regulate free expression. the two paramount interests—avoiding a chilling effect, while still permitting local officials to deter core criminal conduct effectively—would be successfully addressed.

This formulation would satisfy the fear of the *Munson* dissent that state efforts to enforce criminal conduct statutes might be thwarted. It would also address the concerns of the majority that as a matter of "prudential standing," a plaintiff should "have a 'sufficiently concrete interest in the outcome of [the] suit to make it a case or controversy.' " 104 S. Ct. at 2846 n. 5, *quoting Singleton v. Wulff*, 428 U.S. 106 (1976). A person charged in good faith with core criminal conduct does not have that "concrete interest" in common with those who arguably suffer from any "chilling effect."

D. Even if Ray Hill Is Permitted To Assert an Overbreadth Claim, on Behalf of Others, He Should Not Prevail Because Any Overbreadth in the Houston Ordinance Is Clearly Not Substantial.

Cases such as *Broadrick*, *Ferber*, and *Munson* establish conclusively that in order to prevail in an overbreadth claim, a plaintiff must show that a statute's overbreadth is *substantial*. But as already shown, any overbreadth in the Houston ordinance is not substantial. Therefore, even if Ray Hill is permitted to assert the free-speech rights of other unidentified persons, his overbreadth claim must fail.

The Houston ordinance is not overbroad, for the reason that its impermissible applications—of which the trial court record does not show even one—are clearly dwarfed by the hundreds of legitimate uses to which the ordinance can

be put. Any overbreadth, then, must be "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 616. By that criterion, the majority below erred in finding "a realistic danger of, and a substantial potential for, the unconstitutional application of the ordinance" (J.S. App., p. A-15).

Broadrick also emphasizes the "noncensorial" nature of the statute it reviewed. 413 U.S. at 616. As a criminal conduct law, the Houston ordinance is even less related to the content of particular speech than was the statute in *Broadrick*, which limited certain political activity. Thus, there is no support for the majority's assertion that "[m]any persons who might otherwise speak are likely to be silenced by the policeman's threat to invoke his authority (J.S. App., p. A-16). Its suggestion that the City "proscribe[s] speech or other free expression that does not threaten immediate danger to the police or to legitimate law-enforcement endeavors" (J.S. App., p. A-20) is equally without support in the record.

Under the reasoning of *Broadrick*, substantial overbreadth occurs only where there is a substantial chilling effect, or deterrent effect, that results from an ordinance's very existence. Ray Hill has not shown that any Houston resident has ever been chilled by the presence of the Houston ordinance. It follows, therefore, that the ordinance cannot be substantially overbroad.

A further factor saves the ordinance from invalidation. Even if it were, *arguendo*, substantially overbroad, it satisfies an important exception to the overbreadth doctrine set forth in *Broadrick*: "[A] limiting construction . . . could be placed" on it, very easily. The question of limiting construction is discussed in Point II, *infra*.

II. A Federal Court Should Not Invalidate A Municipal Ordinance on the Basis of Facial Overbreadth Where the Ordinance May Be Judicially Limited.

A. Where the State Courts Have Not Acted, a Federal Court May Fashion a Limiting Construction of the Ordinance.

In *Broadrick v. Oklahoma,* the Court properly noted that "facial overbreadth has not been invoked when a limiting construction *has been or could be* placed on the challenged statute." 413 U.S. at 613 (emphasis added). This may occur, for example, where the state courts have already construed a statute narrowly enough that it does not apply to constitutionally protected conduct. E.g., *Gooding v. Wilson,* 405 U.S. 518, 522-23 (1972).

In *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942), for example, the state court had construed the statute to do "no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. . . ." *Id.* at 573. Such a state court construction of its statute is, of course, binding on the federal courts. *New York v. Ferber,* 458 U.S. at 769 n. 24.

Here, no state court has construed the Houston ordinance. But, under the alternative "could be placed" standard of *Broadrick,* a federal court may fashion an interpretation that does not cover conduct that is constitutionally permitted. *See Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 60 (1976). Thus, facial challenges will not be sustained if a reasonable alternative reading is available. Several cases illustrate the Court's inclination to exercise restraint and to avoid constitutional invalidation in the free-speech area by careful statutory construction.

In *Cantwell v. Connecticut,* 310 U.S. 296 (1940), the Court refused a request for facial invalidation of a "breach of the peace" statute, despite its conclusion that the statute was analogous to one "sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive branch too wide a discretion in its application." *Id.* at 308. It held the statute invalid *only* as applied to the plaintiff. The Court should reject the facial attack on the Houston ordinance just as it did as to the statute in *Cantwell.*

Again, in *United States v. Grace,* 461 U.S. 171 (1983), the Court denied a facial constitutional challenge to a federal statute, 40 U.S.C. § 13k (1983), prohibiting demonstrations on the Supreme Court grounds. Although the statute on its face could be construed to apply as well to First Amendment-protected conduct at protected locations, the Court properly held that a facial challenge was inappropriate but that the statute could not be applied to certain locations.

Finally, in *Brockett v. Spokane Arcades, Inc.,* 472 U.S. 491, 105 S. Ct. 2794 (1985), the Court rejected a facial challenge to a state obscenity statute even though the statute could be read to cover protected activity. Instead, it held the law unconstitutional only as applied to protected conduct.[4]

Thus, it is well settled that in considering a challenge to a statute or ordinance on the basis of overbreadth, a federal court, absent definitive construction by the state

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4. *See also Marsh v. Alabama,* 326 U.S. 501 (1940); *NAACP v. Button,* 371 U.S. 419 (1963).

courts, should, at the same time it conjures up hypothetical overbroad applications, consider reasonable limiting readings of the statute as well. E.g., *Dombrowski v. Pfister*, 380 U.S. 479, 480 (1965).

B. The Houston Ordinance Is Readily Subject to a Limiting, Constitutional Construction.

The Houston ordinance, designed to assist police officers in the lawful exercise of their peacekeeping function, clearly prohibits at least a "core of easily identifiable and constitutionally proscribable conduct. . . ."[5] Hence, unlike the situation in *Secretary of State of Maryland v. Joseph H. Munson Co.*, where the majority held the statute unconstitutional "in all its applications," 104 S. Ct. at 2852, the Houston ordinance, assuming *arguendo* that it impermissibly affects protected activity, easily can be construed narrowly so as not to infringe on constitutionally-protected rights.

The first obvious narrowing construction is to impose an intent, or *mens rea*, requirement. That is easily done, since as a matter of law an intent requirement is a necessary element of all Texas criminal statutes and ordinances. Thus, the imposition of a *mens rea* requirement does not really require a narrowing construction at all; it is already part of the Houston ordinance.

Section 6.02 of the Texas Penal Code imposes a requirement of intent and culpable mental state on all

5. *See*, e.g., *Secretary of State of Maryland v. Joseph H. Munson Co.*, 104 S. Ct. at 2851-52; *United States Civil Service Commission v. Letter Carriers*, 413 U.S. 548, 580-81 (1973); *Parker v. Levy*, 417 U.S. 733, 760 (1974).

criminal statutes and ordinances.[6] The culpable mental states are fully defined in section 6.03.[7] In *Pollard v. State*,

6. Tex. Penal Code Ann. § 6.02 (Vernon's 1974) reads as follows:
§ 6.02. Requirement of Culpability
(a) Except as provided in Subsection (b) of this section, a person does not commit an offense unless he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires.
(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.
(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b) of this section, intent, knowledge, or recklessness suffices to establish criminal responsibility.
(d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:
(1) intentional;
(2) knowing;
(3) reckless;
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(e) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged.

7. Tex. Penal Code Ann. § 6.03 (Vernon's 1974) reads as follows:
§ 6.03. Definitions of Culpable Mental States.
(a) A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.
(b) A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
(c) A person acts recklessly, or is reckless, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

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687 S.W.2d 373, 374 (Tex. App. 5 Dist. 1985, pet. ref'd), the Texas Court of Appeals has made it clear that where a City ordinance does not include an element of intent, "section 6.02(b) supplies the required mental state by providing that unless the definition of the offense plainly dispenses with any mental element, a culpable mental state is required."

The majority below incorrectly asserts that "[t]he ordinance requires no *mens rea*," and that "[i]t may be violated whether or not the accused intended to interfere with or oppose a policeman" (J.S. App., p. A-16).[8] Although the official complaint form[9] contains the words "did then and there *willfully or intentionally* interrupt a city policeman . . ." (emphasis added), the court below reads those words as merely an attempt to remedy an "evident defect" in the ordinance (*id.*, p. A-13). However, the existence of sections 6.02 and 6.03, together with the City's own interpretation of the ordinance, demonstrates that there is no defect at all.

The dissent below suggests several reasonable limiting constructions (J.S. App., pp. A-47 through A-48). The first is to add an intent requirement, which, as the City

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All of these limiting constructions are reasonable inferences of the intent of the Houston City Council. The point is not that they are the *only* constitutionally permissible readings (for presumably they are not), but rather that these narrowing constructions are readily available to the state courts and obviate the necessity of a federal court to invalidate the ordinance on its face.

Such readings meet the need for, in the words of the majority below, "an ordinance to protect police from assault, physical abuse, and from conduct that obstructs their legitimate law-enforcement activities" (J.S. App., p. A-20). These narrowing constructions would remove the possibility that, at its outer reaches, the Houston ordinance impermissibly could touch the lives of innocent civilians who, unlike Ray Hill, have no intent to interfere with police operations.

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For example, the constructions offered by the dissent below would adequately address the three "overbreadth" examples hypothesized by the panel majority below: the mother who pleads with a police officer arresting her son to "spare my baby"; tourists who ask directions from an officer who is in the process of questioning a suspect; and the person in a crowd at a political function who begs the officer to let him past the barricade. *See Hill v. City of Houston*, 764 F.2d 1156, 1163 (5th Cir. 1985). In short, a number of constitutional limiting constructions can easily be identified.

C. There Is Ample Opportunity for the State Courts of Texas To Place a Limiting Construction on the Houston Ordinance.

All ordinances of the City of Houston are subject to judicial review. The fact that the subject ordinance has not been so reviewed may simply indicate that its effect upon desired First Amendment conduct is not "real and substantial" enough to have caused anyone to challenge it.

The Texas courts certainly have not declined to construe or limit the ordinance. Houston's municipal courts, where cases brought under the City's ordinances are tried, have been courts of record since 1976, and a defendant may appeal to a county criminal court at law. Tex. Gov't Code Ann. § 30.269(a) (Vernon Supp. 1986).[10] If the fine exceeds one hundred dollars, there is a right to appeal

10. Under Texas law, First Amendment challenges can be raised defensively in a criminal prosecution, thus diminishing any chilling effect. *See*, e.g., *Clark v. State*, 665 S.W.2d 476, 482 (Tex. Crim. App. 1984); *Al-Omari v. State*, 673 S.W.2d 892, 896-98 (Tex. App. 9 Dist. 1984, pet. ref'd).

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The record does not reflect any instance in which any person has been denied or thwarted in seeking review of this or any other Houston ordinance. Although the majority below characterizes the Texas criminal appellate process as a "maze" (J.S. App., p. A-18), it is in fact a simple and typical system. In short, the mechanism for such a challenge to the constitutionality of the ordinance is readily available in the state courts.

III. A Federal Court Should Abstain from Deciding a Constitutional Challenge to a Municipal Ordinance Where the State Courts Have Not Construed That Ordinance.

Although a serious question was raised regarding whether the federal courts should have abstained from reviewing the constitutionality of the Houston ordinance, the majority below, remarkably, did not discuss that issue. However, it is evident that questions regarding the role of federal courts in relation to the states and their court systems are absolutely central to this case. As this Court has stated in *Harman v. Forssenius*, 380 U.S. 528, 534 (1965),

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The concepts underlying the abstention doctrine thus are grounded in principles of comity and federalism; avoidance of constitutional issues where possible; and deference to local expertise. These considerations are related and have as their root this Court's opinion in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 643 (1941). There the Court, though faced with a "more than substantial" constitutional issue—a challenge to a Texas statute as violative of the Fourteenth Amendment because of a classification based on race—held that the federal courts should abstain where "a definitive ruling on the state issue [i.e., a limiting construction of a state statute] would terminate the controversy." *Id.* at 644. Thus, the Court ruled that the Texas state courts should be permitted the first chance to interpret that statute. *Id.* at 645.

A. Federal Courts Should Allow State Courts to Interpret Local Law and Thereby Avoid Premature and Possibly Unnecessary Constitutional Adjudication.

Abstention is justified by the avoidance of what this Court has termed "premature constitutional adjudication." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 308 (1979). This is but a restatement of one

of "two of the cardinal rules governing the federal courts: '[o]ne never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 2801 (1985), *quoting United States v. Raines*, 362 U.S. 17, 21 (1960).[13]

Thus, even apart from the question of narrowing construction, discussed *supra* Part II, the federal courts simply should not involve themselves with a local ordinance which no state court has construed. Such abstinence is inherent in a federal system and is essential where a paramount principle is the avoidance of unnecessary constitutional adjudication wherever possible.

As the City has shown, *supra*, the procedural mechanism is well in place for a review, in the state courts, of the ordinance's validity by a person seeking to challenge it. The fact of no previous review, coupled with full opportunity for review, is certainly a sufficient basis for this Court to invoke the *Pullman* doctrine.

While abstention may not be appropriate merely to give state courts the first opportunity to vindicate a federal claim,[14] it is proper where the state statute is obviously susceptible of a limiting construction. *Harman v. Forssenius*, 380 U.S. at 534; *Baggett v. Bullitt*, 377 U.S. 360, 375-79 (1964). The existence of sections 6.02 and 6.03 of the Texas Penal Code conclusively demon-

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13. *Accord, New York v. Ferber*, 458 U.S. at 767 n. 20; *Liverpool, N.Y. & Philadelphia SS. Co. v. Comm'rs of Emmigration*, 113 U.S. 33, 39 (1885).

14. *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963).

> Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication.

The concepts underlying the abstention doctrine thus are grounded in principles of comity and federalism; avoidance of constitutional issues where possible; and deference to local expertise. These considerations are related and have as their root this Court's opinion in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 643 (1941). There the Court, though faced with a "more than substantial" constitutional issue—a challenge to a Texas statute as violative of the Fourteenth Amendment because of a classification based on race—held that the federal courts should abstain where "a definitive ruling on the state issue [i.e., a limiting construction of a state statute] would terminate the controversy." *Id.* at 644. Thus, the Court ruled that the Texas state courts should be permitted the first chance to interpret that statute. *Id.* at 645.

A. Federal Courts Should Allow State Courts to Interpret Local Law and Thereby Avoid Premature and Possibly Unnecessary Constitutional Adjudication.

Abstention is justified by the avoidance of what this Court has termed "premature constitutional adjudication." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 308 (1979). This is but a restatement of one

of "two of the cardinal rules governing the federal courts: '[o]ne never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S. Ct. 2794, 2801 (1985), *quoting United States v. Raines*, 362 U.S. 17, 21 (1960).[13]

Thus, even apart from the question of narrowing construction, discussed *supra* Part II, the federal courts simply should not involve themselves with a local ordinance which no state court has construed. Such abstinence is inherent in a federal system and is essential where a paramount principle is the avoidance of unnecessary constitutional adjudication wherever possible.

As the City has shown, *supra*, the procedural mechanism is well in place for a review, in the state courts, of the ordinance's validity by a person seeking to challenge it. The fact of no previous review, coupled with full opportunity for review, is certainly a sufficient basis for this Court to invoke the *Pullman* doctrine.

While abstention may not be appropriate merely to give state courts the first opportunity to vindicate a federal claim,[14] it is proper where the state statute is obviously susceptible of a limiting construction. *Harman v. Forssenius*, 380 U.S. at 534; *Baggett v. Bullitt*, 377 U.S. 360, 375-79 (1964). The existence of sections 6.02 and 6.03 of the Texas Penal Code conclusively demon-

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13. *Accord, New York v. Ferber*, 458 U.S. at 767 n. 20; *Liverpool, N.Y. & Philadelphia SS. Co. v. Comm'rs of Emmigration*, 113 U.S. 33, 39 (1885).

14. *McNeese v. Board of Education*, 373 U.S. 668, 671 (1963).

strates that a Texas court would never construe the Houston ordinance to require "no *mens rea,*" as the majority below asserted (J.S. App., A-16). In addition, Texas courts have declared that ordinances that are enforced without a culpable mental state are unconstitutional.[15] Thus, the ordinance at issue would obviously be subject to the type of limiting state court construction necessary to pretermit a decision on the facial invalidity of the ordinance by a federal court.

B. The Interests of Comity and Federalism Weigh Heavily in Favor of Abstention in This Case.

In *Pullman*, this Court spoke forcefully of abstention as "appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary." 312 U.S. at 501. Thus, this case is a "paradigm" of a situation in which "abstention may be required 'in order to avoid unnecessary friction in federal-state relations [and] interference with important state functions. . . .'" *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 306 (1979).

Implicit in the reasoning of the majority below is the view that state courts cannot be trusted to decide a constitutional issue properly. If a dual system of courts means anything, however, such a view should be rejected. The unfortunate logical extension of this perception is that a plaintiff would always have first recourse to the federal

15. *Pollard v. State,* 687 S.W.2d 373, 374 (Tex. App. 5 Dist. 1985, pet. ref'd).

courts in any case where a constitutional issue can be found, regardless of the existence of a parallel remedy in the state courts. Such a result would eviscerate our federal system and unduly burden federal courts.

Deference to the *courts* of a state is only one element of the concern. Equally vital to recognition of "the rightful independence of the state governments" is deference to the state or local *legislative* body. Thus, a *federal* court should be reluctant to step in before a state court has had a chance to determine that a local policymaking body acted constitutionally. This reluctance should be especially acute when the federal court intervention affects an important state function, such as law enforcement.

Since the principle of abstention is, at least in some of its aspects, a doctrine of restraint, it is instructive here to consider any negative consequences of such restraint to determine whether they are great enough to outweigh the compelling arguments for abstention. In the first place, the City agrees with the dissent below that "[a]s with the statute in [*Colten v. Kentucky*], the potential reach of this ordinance does not seriously and manifestly threaten the constitutionally protected conduct of anyone . . ." (J.S. App., p. A-52). The fact that this is the first reported challenge to the constitutionality of the ordinance in its lengthy existence is less a result of any mythical "statutory maze" (J.S. App,, p. A-18) in the Texas courts than it is a reflection of the fact that apparently the ordinance has not been applied to First Amendment activity.

Moreover, the dearth of reported cases may also show that the Texas courts adequately dealt with any constitutional issues if and when presented. As noted by the dissent, "[t]he absence of contests in state courts is no more justification for the majority's preemptive strike than the

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IV. An Appellate Court Should Not Make Independent Fact-findings in Reviewing the Evidence Before the Trial Court.

Rule 52(a) of the Federal Rules of Civil Procedure requires the trial court, in an action tried without a jury, to make findings of fact and conclusions of law. The Rule further provides: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." As this Court has stated, Rule 52(a) was "intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. . . . The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witness would be the best judged, had great weight with the appellate court." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948).

A reviewing court oversteps its bounds if it undertakes to duplicate the role of the lower court regarding fact-finding. *Anderson v. City of Bessemer City*, 470 U.S. 564, ____, 105 S. Ct. 1504, 1511 (1985). Moreover, appellate courts, in reviewing the findings of a district court sitting without a jury, must keep in mind that their function is not to decide issues *de novo*. *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

The majority below, in reaching its conclusion that the ordinance had a realistic danger of unconstitutional application, stressed the fact that "[m]any persons who might otherwise speak are likely to be silenced by the policeman's threat to invoke his authority" (J.S. App., p. A-16). In addition, as pointed out in dissent, the majority of the Court of Appeals relied heavily upon "its conclusion that 'the ordinance is officially regarded as penalizing the mere interruption of a policeman while in the line of duty' and its repeated insinuation that the ordinance is being applied in an unconstitutional manner" (J.S. App., pp. A-26, A-27). These statements by the Court of Appeals are little more than an independent fact-finding by the majority as to whether a substantial potential for the unconstitutional application of the ordinance existed.

The trial judge heard testimony from Hill and four other individuals, regarding the circumstances of their arrests under the ordinance, and reviewed an abstract from official records of short-hand statements contained in police reports of other arrests made under the ordinance (J.S. App., p. A-27). The trial judge then entered a finding that "The Court finds no evidence that the ordinance is used to make improper or illegal arrests (J.S. App., p. B-3). In like manner, the majority below examined the list of charges that had been offered by Hill in the trial court and recognized that these charges merely contained descriptive words used by the various arresting officers and were not necessarily accurate (J.S. App., pp. A-23, A-24). Further, the majority recognized that most of the listed cases described conduct that was patently unlawful (J.S. App., p. A-13). Moreover, the majority noted that the trial court's finding that the ordinance has in fact never been unconsti-

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tutionally applied, either as to Hill or to others, was not challenged on appeal (J.S. App., p. A-9).

Despite the existence of this unchallenged lower court finding, the majority indulged in its own statistical analysis of the list of charges and found that:

> The list of charges demonstrates that the ordinance is officially regarded as penalizing the mere interruption of a policeman while in the line of duty. The City apparently sees no problem in characterizing "talking" and "arguing" as offenses under the ordinance. (J.S. App., p. A-13.)

An appellate court is bound by the "clearly erroneous" standard of Rule 52(a) and cannot substitute its findings for those of the trial judge. *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). The district court's findings are subject to the Rule 52(a) standard even when the findings are not based solely on credibility determinations but are based on physical or documentary evidence or inferences drawn from other facts. *Anderson v. City of Bessemer City,* 105 S. Ct. at 1512. Therefore, the majority's interpretation of the statistical data supplied to the lower court, and the application of this data to make an independent fact-finding, were in violation of Rule 52(a).

If the existence of intentional discrimination is "a pure question of fact," *Pullman-Standard v. Swint,* 456 U.S. at 288, so is the existence of "a realistic danger of, and a substantial potential for, the unconstitutional application of the ordinance" (J.S. App., p. A-15). To establish the latter, the majority below cites the "charges offered in evidence" and their results (*id.*). This is similar to the "ultimate fact" in *Swint,* 456 U.S. at 286.

Although it may be a conclusion of law that the ordinance contains no *mens rea* (J.S. App., pp. A-15 through A-17), how the City interprets and applies the ordinance is clearly a question of fact and is subject to Rule 52(a) (J.S. App., p. A-9). Although the majority below seemed to find ultimately that the City applies the ordinance without requiring proof of intent (J.S. App., pp. A-13 through A-17), it noted in passing the existence of an inconsistent fact: that the City's complaint form remedies the defect of an intent requirement by supplying additional words requiring that the accused "willfully or intentionally interrupted a city policeman."

Under *Broadrick,* a court cannot be expected to ignore authoritative pronouncements of those administering a statute in determining the breadth of a statute. 413 U.S. at 618. Moreover, under Rule 52(a) the Court of Appeals cannot make its own *de novo* interpretation of documentary evidence. The trial court did not expressly address whether the City applied the ordinance only to intentional interruptions, but that implication exists in its finding "no evidence relating to the disposition of this type of case which shows that the ordinance is used to make improper or illegal arrests" (J.S. App., p. B-3).

The trial court made similar findings regarding the four instances about which there was testimony: "These are *not* instances where someone unwittingly stumbled upon an investigation" (J.S. App., p. B-7). The trial court also found that Hill acted with the requisite intent when he was arrested under the ordinance (J.S. App., p. B-10). If the Court of Appeals found that these fact-findings were inadequate or made under an erroneous view of the law, it should have remanded for further proceedings. *Pullman Standard v. Swint,* 456 U.S. at 291-92.

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Rule 52(a) recognizes that it is the special province of the trial judge to determine the weight and credibility of the evidence. The trial court listened to the testimony, judged the credibility of the witnesses, and reviewed the documentary evidence and found that the ordinance had not been used to make illegal or improper arrests. The inferences made by the majority below—that the ordinance would have a substantial effect on persons not before the court—were nothing more than prohibited fact-findings. Because the majority below erred in assuming a fact-finding role in analyzing the evidence before the trial court, which led to an erroneous opinion, the judgment below should be reversed, and that of the trial court affirmed.

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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December 1986

APPELLEE'S

BRIEF

(5)

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF HOUSTON, TEXAS, *Appellant*,

v.

RAYMOND WAYNE HILL, *Appellee*.

On Appeal From The United States Court of Appeals
For The Fifth Circuit

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QUESTIONS PRESENTED

(1) Whether the Ordinance is unconstitutional on its face under the first and fourteenth amendments, for both substantial vagueness and substantial overbreadth, because it confers standardless discretion on Houston police officers, municipal judges, and juries to determine whether spoken words are punishable as a criminal "interruption"?

(2) Whether the abstract possibility that the Ordinance might be clarified or limited to constitutional dimensions in a single state adjudicative proceeding within the foreseeable future is so remote as to be practically nonexistent?

(3) Whether the City's strategic decision not to invoke the abstention doctrine until after the adverse decision on the merits by the Court of Appeals should be regarded as an unexcused procedural default that now bars assertion of the claim?

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OPINIONS BELOW

The unreported findings and conclusions of the District Court are reproduced as Appendix B-1 in the jurisdictional statement. Both the panel and *en banc* opinions of the Court of Appeals are reported. *Hill* v. *City of Houston*, 764 F.2d. 1156 (5 Cir., 1985), *on rehearing en banc*, 789 F.2d 1103 (5 Cir., 1986) (J.S. at A-1).

JURISDICTION

The Court has jurisdiction of the City's timely appeal under 28 U.S.C. § 1254(2). *City of New Orleans* v. *Dukes*, 427 U.S. 297, 301-03 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the courts below, this case involved the constitutionality under the first and fourteenth amendments, both on its face and as applied, of the following emphasized language in a 100-year-old Houston municipal ordinance ("the Ordinance"):

> **Sec. 34-11. Assaulting or interfering with policemen.**
>
> (a) It shall be unlawful for any person to assault, strike *or in any manner oppose, molest, abuse or interrupt* any policeman in the execution of his duty, or any person summoned to aid in making an arrest (emphasis added).[1]

STATEMENT OF THE CASE

On February 14, 1982, Raymond Wayne Hill was arrested and jailed for 18 hours by Houston police officers J.L. Kelley

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[1] In both the District Court (R. I: 138) and the Court of Appeals (Brief for Appellant at 3), Hill challenged only the italicized words in paragraph (a), not the Ordinance *in toto*, as the City incorrectly asserts at page 1 of its brief.

Although the Court of Appeals mistakenly declared the entire Ordinance unconstitutional on its face, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, ____, 105 S.Ct. 2794, 2802, 86 L.Ed.2d 394, 406 (1985), that error is of no practical significance because the prohibitions against "assaulting" or "striking" a police officer are preempted by state law and therefore are unenforceable in any event. See Tex. Penal Code § 1.08 (1974) and discussion, *infra*.

and R.D. Holtsclaw for alleged violation of the Ordinance (J.A. 12-18). Officer Kelley[2] charged Hill with "wilfully or intentionally interrupt[ing]" by "verbal challenge" his investigation of Charles Hill, a young black man unrelated to Raymond Hill, who is white (J.A. 2-3; 53). Hill subsequently was acquitted of that charge by a Houston municipal judge.

According to Officer Kelley's testimony in federal court,[2] he had detained Charles Hill shortly after midnight in Houston's Montrose area, after observing him in the middle of Westheimer Street, apparently impeding and attempting to stop heavy traffic (J.A. 13; 51-53; 65-66).[3] Both Raymond Hill and Charles Hill explained that Charles Hill was attempting to help a friend back out of a parking space (J.A. 13; R. IV: 86-87; Pl. Ex. 13: 6-7). Officer Kelley "didn't see that [but it] could very well have happened" (J.A. 53).

Officer Kelley further testified that, after he had called Charles Hill over to the sidewalk and obtained his identification, he was warning him about the dangers of traffic when Hill began acting in a peculiar manner, "walking away, twitching and making all kinds of strange noises from his throat" (J.A. 54; 56-57; 65). According to the officer, he had merely taken Charles Hill's arm, stopped him, and turned him around (J.A. 57) when, from at least seven or eight yards away (J.A. 58; 68), Raymond Hill stated, in a very loud, commanding voice (J.A. 71), "[L]eave him alone, he didn't do anything wrong" (J.A. 55; 68); that, almost instantly thereafter (J.A. 71), Raymond Hill said, in a louder and more boisterous tone, "I said, leave him alone. Why don't you pick on somebody your own size?" (J.A. 58), and that when Officer Kelley turned around he observed

[2] Officer Holtsclaw did not testify, either in the municipal court criminal trial or in the trial in the United States District Court. Both officers are white (J.A. 14).

[3] At its inception Officer Kelley's detention of Charles Hill was lawful under a municipal ordinance, since repealed, prohibiting "in any manner [impeding] the safe and free passage of persons or vehicles along the streets." Sec. 41-9(a), Code of Ordinances, City of Houston, Texas (1968). *See Florida v. Rodriguez*, 469 U.S. 1 (1984); *Brown v. Texas*, 443 U.S. 47, 51-52 (1979).

Raymond Hill standing in the middle of a crowd of between 15 and 30 people that the officer said he felt "forming around me" even before Raymond Hill spoke (J.A. 55; 62).

At that point, Officer Kelley testified, he asked Raymond Hill, "Are you interrupting me in my official capacity [or, perhaps, "duties"] as a Houston police officer?", to which Hill allegedly responded by putting his hands on his hips and saying, "Yes. Why don't you pick on somebody my size?" (J.A. 58; 72). Officer Kelley characterized Hill's words as "challenging me and baiting me into an arrest" (J.A. 58; 76). For speaking those words, without any forewarning,[4] Raymond Hill immediately was arrested, handcuffed, and taken to jail (J.A. 16 58-59). Charles Hill was released by the officers without being charged with any criminal offense (J.A. 17; 54; 58).

Raymond Hill's version of what happened, apparently credited by the Houston municipal court judge who acquitted him, was substantially different. He testified in the federal trial that both Officer Kelley and Officer Holtsclaw had surrounded Charles Hill and challenged him to fight after misconstruing his behavioral peculiarities as ridicule of Officer Kelley, when in fact his erratic bodily movements resulted from a medical condition (J.A. 14-15). Raymond Hill's testimony was that his initial statements, prompted by Officer Kelley drawing back his flashlight, had been, "[D]on't hit that kid, he has done nothing wrong. If you want to pick on somebody, pick on somebody your own size" (J.A. 15), words he testified had been intended simply "to prevent the officers from brutalizing Charles Hill" (J.A. 40).[5] Charles Hill's deposition testimony confirmed that Officer Kelley's posture was aggressive and that the officer was

[4] Officer Kelley testified that he never ordered either Hill or the crowd to leave the scene (J.A. 69). The District Court's fact-finding that Raymond Hill was "warned" that "he would be charged with interference with an officer" (J.S. at B-2) is clearly erroneous because there is no evidence in the record to support it. Rule 52(a), F.R.Civ.P.

[5] Raymond Hill testified that he felt he had never violated the Ordinance, on this or any other occasion (J.A. 31), testimony the District Court apparently accepted (J.S. at B-9).

shouting at him when Raymond Hill initially spoke (R.IV: 86-87; Pl. Ex. 13: 16-17; 22; 37).

Raymond Hill was arrested only for what he said, not for any conduct or threatened conduct (J.A. 58). Officer Kelley admitted that he did not regard Hill's words as abusive (J.A. 73-74); that the crowd[6] that allegedly had gathered almost instantaneously approximately seven or eight yards from the encounter was not boisterous or disorderly, did nothing illegal, and made no attempt whatever to protest or interfere with either Charles Hill's interrogation or Raymond Hill's arrest (J.A. 58; 62-63; 68-70; 75-76); and that Raymond Hill was not inciting a riot, encouraging anyone else to intervene, or otherwise creating a disturbance (J.A. 75; 79-80). No one in the alleged crowd said anything to Officer Kelley, who admittedly never directed either Raymond Hill or the crowd to leave the scene (J.A. 63; 69). His own testimony leaves no doubt as to why he made the arrest: "[Raymond Hill] had already told me that he was interrupting me and he was challenging me and baiting me into an arrest, and I arrested him for the offense. That was the end of that." (J.A. 58).

Hill subsequently was found not guilty *of* violating the Ordinance following a non-jury trial before a Houston municipal court on April 14, 1982. Two weeks later he instituted this action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Texas against the City and the two arresting officers, alleging that the words "in any manner oppose, molest, abuse or interrupt" in the Ordinance are on their face unconstitutionally vague and overbroad and,

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[6] The District Court's fact-findings (J.S. at B-1) make no reference to the supposed "crowd." Officer Kelley admitted that he had not previously mentioned any crowd in his testimony sixteen months previously at Raymond Hill's trial in the Houston municipal court (J.A. 62). Charles Hill's deposition testimony was that, in addition to the officers and him, five other people were on the scene: Raymond Hill, Charles Hill's white female companion, and three other unidentified individuals (R. IV: 86-87; Pl. Ex. 13: 53).

A transcript of the testimony in Raymond Hill's municipal court trial is unavailable because the court reporter destroyed her transcribed notes of the proceedings following Hill's acquittal.

in view of their conceded applicability to speech, violative of the first and fourteenth amendments. He also alleged that the Ordinance had been applied unconstitutionally, in violation of the first amendment, to the spoken words that had prompted his arrest and criminal prosecution. He sought declaratory and injunctive relief against further enforcement of the Ordinance, actual and exemplary damages, expunction of the records of his arrest and criminal prosecution,[7] court costs, and reasonable attorney's fees under 42 U.S.C. § 1988 (R. I.: 138).

The case was tried before the District Court without a jury in August, 1983, after the two police officers had been dismissed as defendants by agreement of the parties. Thereafter, in February, 1984, the District Court entered findings of fact and conclusions of law, upholding the legality of Hill's arrest and criminal prosecution two years earlier; sustaining the legality of his arrest and prosecution under the Ordinance in three other cases; finding that the Ordinance had been applied lawfully to four other witnesses (two Houston television news photographers, a photographer for a private accident investigation service, and the operator of a local nightclub); and rejecting on the merits each of Hill's federal constitutional claims (J.S. at B-1).

On appeal, a panel of the Fifth Circuit reversed, one judge dissenting. *Hill* v. *City of Houston*, 764 F.2d 1156 (5 Cir. 1985). After impliedly rejecting as clearly erroneous under Rule 52(a), F.R.Civ.P., the District Court's fact-finding that Hill's words amounted to "[shouted] abuses,"[8] and after concluding that Hill's four arrests, prosecutions, and acquittals or dismiss-

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[7] See Art. 55.01, Tex.C.Cr.P. (1986 Supp.); *Garris* v. *Rowland*, 678 F.2d 1264, 1275-76 (5 Cir., 1982), *cert. denied sub nom. City of Fort Worth* v. *Garris*, 459 U.S. 864 (1982).

[8] 764 F.2d at 1158. Officer Kelley himself testified that he did not regard Hill's words as "abusive" (J.A. 73-74).

Ironically, from 1874 until 1968, Houston's Code of Ordinances contained an admonition that "[p]olicemen should not become offended at any harsh or abusive language that may be applied to them." Art. 332, Rule 20, Revised Code of Ordinances, City of Houston, Texas (1874); Sec. 30-30, Code of Ordinances, City of Houston, Texas (1958).

als under the Ordinance conferred on him Article III standing to institute a first amendment attack on the facial constitutionality of the law,[9] the panel held the challenged language to be substantially overbroad on its face and therefore unconstitutional under the first amendment. The panel did not reach either the issue of facial vagueness or the "as applied" contention, although the dissenting opinion did. 764 F.2d at 1161, 1168, 1172 n.4.

Having lost on the merits, the City then argued for the first time in its suggestion for rehearing *en banc*, after more than 39 months of litigation, that the Court of Appeals should have abstained from deciding the facial vagueness-overbreadth issues. None of the 15 judges of the *en banc* Court addressed or even acknowledged that previously unasserted claim. Instead, by a vote of 8-7, the Court of Appeals again struck the Ordinance's language on its face for substantial, unconstitutional overbreadth. *Hill* v. *City of Houston*, 789 F.2d 1103 (5 Cir. 1986) (J.S. at A-1).[10] The Court of Appeals majority rejected Hill's claims for actual damages, a permanent injunction against enforcement of the Ordinance, and expunction of the records of his arrest and criminal prosecution with the cryptic statement that "Hill has failed to show that he sustained any actual damages as a result of his arrest," 789 F.2d at 1113 (J.S.

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[9] Hill has been arrested under the Ordinance, but never convicted, on four different occasions over a seven-year period, the last time during the pendency of this action in the District Court. 764 F.2d at 1159.

In these circumstances, all judges of the Court of Appeals—and, by implication, the City in its jurisdictional statement and brief—agree that Hill confronts a "credible threat" of future arrest and criminal prosecution under the Ordinance. 789 F.2d at 1107; 1118 (J.S. at A-8; A-34). *Ellis* v. *Dyson*, 421 U.S. 426, 434-35 (1975); *Kolender* v. *Lawson*, 461 U.S. 352, 355 n.3 (1983); *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979); *cf. Wooley* v. *Maynard*, 430 U.S. 705, 712 (1977); *Steffel* v. *Thompson*, 415 U.S. 452, 459 (1974).

[10] While frankly conceding that "the Houston ordinance is undeniably susceptible to applications that would impermissibly regulate or proscribe protected speech," 789 F.2d at 1122 (J.S. at A-43), the dissenting judges nevertheless would have rejected Hill's vagueness, overbreadth, and "as applied" claims, affirmed the District Court's decision to that effect, and permitted the City to continue to enforce the Ordinance as written.

at A-22),[11] a conclusion apparently "[b]ased on the district court's findings of fact" 789 F.2d at 1104 (J.S. at A-2).[12] The dissenting judges viewed this disposition as a unanimous rejection of Hill's contention "that the ordinance was unconstitutionally applied in the actual case presented." 789 F.2d at 1114 (J.S. at A-25.[13]

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[11] In his cross-appeal in No. 86-5678, Hill argues that his "verbal challenge" of Officer Kelley was immunized against criminal prosecution by the first amendment. In this case he contends, regardless of whether his speech was constitutionally protected, that his arrest was an unconstitutional deprivation of liberty under the fourteenth amendment because the Ordinance is unconstitutional on its face under the first amendment for both vagueness and overbreadth. In either event he is entitled at least to nominal damages. *Carey* v. *Piphus*, 435 U.S. 247 (1978). "[T]hough the price tag be a bargain, freedom is never valueless. A . . . finding that a man's freedom is worthless is clearly erroneous. It is an impossible judgment to render against a sentient person . . ." *Whirl* v. *Kern*, 407 F.2d 781, 798 (5 Cir., 1968), *cert. denied*, 396 U.S. 901 (1969).

[12] Both the majority and dissenting opinions mischaracterize as a "finding of fact" the District court's determination that "Hill had not proved that the ordinance has in fact been unconstitutionally applied, either to him or to others . . ." 789 F.2d at 1107; 1115 (J.S. at A-9; A-27). The City makes the same mistake at pages 38-42 of its brief before this Court.

Under Rule 52(a), F.R.Civ.P., a District Court's findings of evidentiary or historical facts drawn from "two permissible views of [testimonial or documentary] evidence" cannot be deemed "clearly erroneous" by a reviewing court. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985); *United States* v. *United States Gypsum Company*, 333 U.S. 364, 394-95 (1948). In cases not implicating federal constitutional rights, the same principle conceivably may extend even to so-called "mixed questions of law and fact," involving the application of an undisputed rule of law to uncontroverted evidentiary facts. See, *e.g.*, *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 n. 19 (1982) (characterizing that issue as "much-mooted").

On the other hand, at least since *Fiske* v. *Kansas*, 274 U.S. 380, 385-86 (1927), this Court consistently has undertaken independent review of the record evidence in state cases "where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." An extensive (if not exhaustive) list of such cases is contained in Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed. 1986) at pages 185-87. The same principle controls federal appellate review of mixed questions of constitutional law and fact determined by a United States District Court. If so, then contrary to the City's assertion at page 40 of its brief, decisions such as whether a municipal ordinance has been or will be unconstitutionally applied are not the sort of evidentiary or historical "fact-findings" governed by Rule 52(a).

[13] While the Court of Appeals majority mistakenly viewed the District

The City's confusion of issues of evidentiary or historical fact subject to Rule 52(a) with the ultimate constitutional question of whether the Ordinance has been unconstitutionally applied in this or any other case accounts for its repeated misstatements at pages 1, 8-9, 10, and 20 of its brief that Hill does not now "[challenge] the trial court's finding that the ordinance was not applied unconstitutionally as to him." Contrary to the City's assertions, Hill's timely cross-appeal under Rule 12.4, pending before the Court in No. 86-5678, squarely presents for review the "as applied" issue.[14] The contention was properly raised, briefed, and argued in a timely manner, at every stage of the proceedings below, and is properly asserted by cross-appeal only because this Court's acceptance of it would necessitate modifying the judgment below to award the damages and expunction relief erroneously denied by the Court of Appeals. *Barry* v. *Barchi*, 443 U.S. 55, 69 n.1 (1979) (concurring opinion of Justice Brennan); *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); Stern, Gressman & Shapiro, *Supreme Court Practice* (6th Ed. 1986) at 382-87.

SUMMARY OF ARGUMENT

The judgment of the Court of Appeals should be affirmed because the Ordinance is unconstitutional on its face under the first and fourteenth amendments, for both substantial vagueness[15] and substantial overbreadth. No readily available

Court's disposition of the "as applied" claim as a "finding of fact . . . not challenged on appeal," 789 F.2d at 1107 (J.S. at A-9), and therefore did not explicitly consider it, the dissenting judges addressed and rejected it. 789 F.2d at 1116 (dissenting opinion) (J.S. at A-28, 29).

[14] In his brief before the Court of Appeals (at page 27), Hill asserted as one of his issues for review that "[t]he application of the Ordinance in this case to 'pure speech,' unaccompanied by any actual or threatened physical conduct, was unconstitutional under the First and Fourteenth Amendments to the Constitution of the United States." The City responded in its brief (at page 17) that "[t]he ordinance has been constitutionally and appropriately applied."

[15] Although the Court of Appeals invalidated the Ordinance only on grounds of substantial overbreadth, and did not reach or decide the facial vagueness claim, Hill nevertheless is entitled to assert both vagueness and overbreadth in support of the judgment below, having consistently advanced and relied upon both grounds throughout this litigation. *Chevron, U.S.A., Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837, 842 n. 7 (1984); *Thigpen* v. *Roberts*, 468 U.S. 27, 29-30 (1984); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979).

clarifying or limiting construction of its opaque, open-ended language would enable a Texas court in a single state proceeding to limit its realistic potential for sweeping misapplication to constitutionally protected speech and expressive conduct.

(1) For 100 years the City has enforced the Ordinance literally as written. As interpreted and applied in practice by the City's police department and municipal courts, the law reaches spoken words alone, unaccompanied by any actual or imminently threatened physical misconduct. The arresting officer's personal, subjective standards determine whether words, conduct, or refusals to obey a command "interrupt" the performance of an official duty and justify arrest and criminal prosecution. When the purported interference consists of spoken words alone, the City has never explained in comprehensible terms what constitutes a punishable "interruption."

Despite the indiscriminate sweep of the Ordinance, the Texas preemption doctrine bars its application to speech or conduct already condemned with greater clarity and precision by state law. For example, while the Ordinance by its terms applies to "assaulting" or "striking" a police officer, such misconduct is actually punishable only under §§ 22.01 and 22.02 of the Texas Penal Code. Because of preemption, the patently illegitimate reach of the Ordinance dwarfs any arguably permissible applications it might otherwise have had.

The City consistently has refused to acknowledge the significance of the fact that Hill was found not guilty of "interrupting" Officer Kelley by "verbally challenging" him. There is no mystery in that acquittal. The Texas Penal Code, the Model Penal Code, the United States Code, and the criminal laws of virtually every other jurisdiction in this country would not condemn such peaceful, non-violent, non-threatening protests by a citizen against perceived police misconduct. Mere remonstrances with a police officer, or criticism of an officer's behavior, cannot in a free society be a crime.

Since the term "in any manner oppose, molest, abuse or interrupt" concededly reaches speech protected by the first amendment, the Ordinance is unconstitutionally vague on its

face because men and women of common intelligence invariably must guess at its meaning and differ as to its application. It is likewise substantially overbroad because its potential for sweeping, improper application to constitutionally protected words far outweighs any conceivable legitimate uses to which it might be put.

Finally, the Ordinance is a classic dragnet law. It consigns to the standardless discretion of a police officer the decision as to when, where, and under what circumstances people may engage in constitutionally protected speech and expressive conduct. Once an officer's decision to arrest and prosecute has been made, the Ordinance then leaves Houston municipal judges and juries free to decide, according to their own personal predilections, whether speech or expressive conduct should be punished by the criminal law. The City effectively has delegated law-making authority to its police officers and municipal courts.

(2) If a state statute or ordinance is readily susceptible to a clarifying or limiting construction by a state court that would confine it to constitutional dimensions, the Court will not invalidate it on its face. On the other hand, if such an acceptable limiting construction is unavailable, or if the possibility of its being implemented in a single state adjudicative proceeding is remote, the Court consistently has condemned statutes or ordinances capable of sweeping and improper application to federally protected constitutional rights. This case is an instance in which the possibility of such a clarifying or limiting state court construction is so remote as to be essentially nonexistent.

The City's proposed limiting constructions would not save the Ordinance. Not only would they permit its continued application to constitutionally protected speech; they would in no way ameliorate its principal vice — the standardless discretion it confers. As a practical matter, there is no realistic possibility of a state limiting construction. No appeal from a conviction under the Ordinance, no state court declaratory or injunctive action, and no certified question to the Texas Court

of Criminal Appeals could dispel the unconstitutional fog that enshrouds this law.

The City easily could reenact the Ordinance to reach only constitutionally unprotected speech and conduct. Its City Council is much better situated than any court to determine whether such an ordinance is necessary and, if so, the prohibitions it should incorporate.

(3) The City's abstention claim is untimely. Having voluntarily submitted to federal adjudication of these constitutional issues, Houston should not be permitted to call time out after 39 months of litigation simply because it is losing. Our Federalism demands abstention, not abdication.

ARGUMENT

(1) The Ordinance Is Unconstitutional On Its Face Under The First And Fourteenth Amendments, For Both Substantial Vagueness And Substantial Overbreadth, Because It Confers Standardless Discretion On Houston Police Officers, Municipal Judges, And Juries To Determine Whether Spoken Words Are Punishable As A Criminal "Interruption."

All of the City's arguments in this Court are derived from the explicit premise that the Ordinance "is needed to assist in legitimate law enforcement in the City of Houston" (Brief for Appellant at 8) because its "hundreds of legitimate uses" (Brief for Appellant at 24) are essential to protect police officers and their criminal investigations from unwarranted disruption or interference. Inexplicably, however, the City never advised Hill's counsel, the District Court, the Court of Appeals, or this Court, in either its jurisdictional statement or its brief on the merits, that the Houston City Council unanimously had voted in the spring of 1981, almost a year before Hill filed this action, eventually to *repeal* the Ordinance.[16] As a result of that deci-

[16] The Council unanimously passed Motion No. 81-1303 on April 7, 1981, approving the City Legal Department's recommendation to omit the Ordinance from what ultimately became the revised 1985 Code of Ordinances.

sion, the Ordinance is not codified, or even published, in the City's current municipal code.

The reason for the City's purely tactical decision to retain the Ordinance (at least until the conclusion of this litigation) is candidly revealed in a document prepared by the City Legal Department, entitled "Request for Council Action," dated August 1, 1985, less than a month after the initial Fifth Circuit panel decision in this case had declared the Ordinance unconstitutional. It accompanied proposed Houston City Ordinance No. 85-1380, ultimately adopted on August 21, 1985, which enacted the 1985 Code of the City of Houston and saved the "interrupting" Ordinance from repeal while simultaneously omitting it from the Code. The "Request for Council Action," signed by Jerry E. Smith, the City Attorney, concludes with the following remarkable paragraph:

> Note: The proposed ordinance saves from repeal § 34-11(a) of the present Code, for the reason that that section is currently being challenged in the federal courts. The failure of Council to save this section from repeal arguably would render the ongoing litigation moot and might subject the City to the payment of substantial legal fees. Section 34-11(a) prohibits assaulting, striking, opposing, molesting, abusing, or interrupting a police officer. *As part of the Code revision process, Council in 1981 [by unanimously adopting Motion No. 81-1303] approved the Legal Department's recommendation to delete § 34-11(a) from the revised Code* on the ground that the [Texas] Penal Code covers threatening an officer with a deadly weapon, causing bodily injury (including pain) to an officer, intentionally touching another person in an offensive manner and disorderly conduct. On July 11, 1985, the Fifth Circuit, by a 2-1 vote, declared § 34-11(a) unconstitutional as a violation of free speech. Particularly in light of the split vote on the Fifth Circuit, the Legal Department recommends that § 34-11(a) be saved from repeal (i.e., continued as a City violation) in order that the City may seek to have this decision overturned. If the decision is reversed, or if further court guidance is provided as to how far the City may go to protect its police officers, Council would then have the option of retaining, amending, or deleting § 34-11(a) (emphasis added).[17]

In short, a divisive and exceptionally time-consuming constitutional controversy has raged for almost five years in the courts of the United States over an Ordinance that the City had already decided to repeal ten months before Hill was arrested under it, a circumstance the City never disclosed to Hill's counsel, to the courts below, or to this Court at any stage of this litigation.[18]

(a) As Authoritatively Interpreted And Applied By The City, The Ordinance Authorizes Police Officers To Decide For Themselves, On The Scene, Whether Speech Constitutes An "Interruption" Sufficient To Justify Arrest And Prosecution.

For approximately 100 years[19] the City of Houston and its

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[17] Although neither the "Request for Council Action" nor Motion No. 81-1303 is in the record, they are public documents maintained in the office of the City Secretary of the City of Houston, are not reasonably subject to dispute, and therefore are properly subject to judicial notice by this Court. *Massachusetts* v. *Westcott*, 431 U.S. 322, 323 n. 2 (1977); *New York Indians* v. *United States*, 170 U.S. 1, 32 (1898); *cf.* Rule 201, F.R.Evid. (distinguishing between "adjudicative" and "legislative" facts).

[18] *Cf. Board of License Commissioners* v. *Pastore*, 469 U.S. 238 (1985); *Pusari* v. *Steinberg*, 419 U.S. 379, 390-91 (1975) (concurring opinion of Chief Justice Burger). Hill's counsel were unaware of the City's previous decision to repeal the Ordinance until October 28, 1986, when the "Request for Council Action" was accidently discovered, attached to Ordinance No. 85-1380, in the office of the City Secretary.

[19] The Ordinance first was enacted as Article 100 of the City's Revised Code of Ordinances, adopted December 27, 1886, effective January 1, 1887. With minor changes in caption, penalty, syntax, and punctuation, it was carried forward in every subsequent city code until 1985, when the Houston City Council simultaneously saved it from repeal to avoid mooting this controversy but intentionally omitted it from Houston's revised 1985 Code of Ordinances, in accordance with a decision the City made in 1981, more than a year before this case began. See Appendix A of this brief at A-1 and nn. 16, 17, and 18, *supra*.

The City voluntarily stopped enforcing the Ordinance after it was initially declared unconstitutional by a panel of the Court of Appeals on July 11, 1985. It remains technically in force pending the outcome of this litigation.

police department routinely have initiated thousands of arrests and prosecutions for the crime of "interrupting" a police officer, a misdemeanor punishable by a fine of not more than $200.00 in one of the City's municipal courts. As authoritatively interpreted and applied by police, prosecutors, and municipal judges, the Ordinance reaches mere speech, unaccompanied by any actual or threatened physical misconduct.[20] The City readily admits that "[o]n its face the ordinance can be applied to a wide variety of activities, some of which concededly cannot constitutionally be punished" (J.S. at 7), yet for 100 years Houston has enforced it literally as written. Virtually all persons charged under the Ordinance are arrested, jailed, and eventually released on a $200.00 cash bond (R. II: 158-59). Prosecutions have not been sporadic; 2,048 complaints were filed under the Ordinance during the two-year period preceding and following Hill's arrest on February 14, 1982 (R. I: 105; R. II: 178-79).

As the City's chief municipal court prosecutor testified (R. II: 151), "interruptions" in practice commonly fall within two broad but distinct categories: spoken words alone—talking, arguing, cursing, and so on—and disobedience of an officer's order, frequently a directive to leave an investigative scene.[21]

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[20] In the District Court three experienced Houston police officers and an instructor at the Houston Police Academy testified that in interpreting and enforcing the Ordinance they drew no distinction between conduct or threatened conduct and "words alone" (R. III: 50-51; 80-81; R. IV: 22-23; J.A. 77). The City's chief municipal court prosecutor confirmed that the Ordinance applies to both verbal and non-verbal "interruptions" (R. II: 163), and Houston's municipal judges consistently have convicted and fined defendants for such alleged offenses as "talking," "arguing," "making false statements," and "refusing to leave scene." (R. II: 164-74; Pl. Ex. 10).

[21] What Justice Stewart said more than 20 years ago about a Birmingham, Alabama municipal ordinance is equally applicable to this case: "[T]his ordinance says that a person may stand on a public sidewalk in [Houston] only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It 'does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.' *Cox* v. *Louisiana*, 379 U.S. 536, 579 [1965] (separate opinion of Mr. Justice Black). Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state." *Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87, 90-91 (1965) (footnotes omitted).

A representative sample (R. II: 164-74; Pl. Ex. 10) of more than 200 municipal court complaints filed under the Ordinance between October, 1981 and March, 1982 (four months before and one month after the February, 1982 arrest of Hill that triggered this litigation) discloses a diverse range of verbal and non-verbal "interruptions"—for example, "failure to remain silent and stationary," "distracting an officer," "making false statements," "arguing," "verbal abuse," "cursing," "heckling and refusing to leave," "talking," "[shooting] finger at officer," "informing prostitutes undercover officer was police," and "refusing to get off roof of burning apartment."

Prosecutions ordinarily are initiated by the arresting officers themselves on printed, standard-form municipal court complaints containing blank spaces completed in the officers' own handwriting (J.S. at A-10 to A-12; J.A. 2-3; R: II: 147; 156-57; Pl. Exs. 2, 3, 6, 7, 8, 9).[22] Complaints are not screened prior to filing by any City prosecutor or municipal judge (R. II: 157-58), nor are the officers provided with any specialized training or instruction concerning the categories of speech or conduct that might constitutionally be punishable as an "interruption" (R. III: 46-49; 77-78). It is the arresting officer's judgment and discretion, exercised *ad hoc*, that initially determine whether conduct, words, or refusals to obey a command violate the Ordinance (R. III: 28-29; 54; J.A. 80). The scope of criminality is limited only by the imagination and creativity of the officer who makes the arrest and then fills in the blank spaces of the complaint form.[23]

No articulable generalizations explain, either in theory or in practice, what constitutes a punishable "interruption" under the Ordinance. Not every intended or inadvertent disruption or distraction is a crime; the officer who arrested Hill conceded

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[22] All cases are prosecuted as "interruptions," rather than as alleged violations of one of the other operative words of the Ordinance (J.A. 2-3).

[23] The officer who arrested and charged Hill referred to the talent necessary for completing the complaint form as "artistic ability" and observed that "you have to be pretty picturesque in one small line to be able to get your point across" (J.A. 79).

that he had "written many citations and conducted many investigations and been interrupted thousands of times, and not taken someone to jail [because] it was not warranted at the time" (J.A. 77). Resolution of the issue of what types of speech or conduct violate the Ordinance, and in what circumstances, is "a judgment call for the officer involved" (R. III: 29; 54; J.A. 80).

When the District Judge attempted to explore that question with Sergeant T. P. Null, who had arrested and charged two different Houston television news photographers with "interrupting" investigations at the scenes of two separate shootings by police,[24] the following colloquy occurred (R. III: 48-49):

> THE COURT: Sergeant, what [Hill's counsel] is asking you, specifically, were you given any guidelines pertaining to when you could arrest somebody for interference?
>
> THE WITNESS: Basically, as long as it fell within the way the ordinance read.
>
> THE COURT: Well, I know, but the ordinance is a very broad ordinance. Were you given any examples of what would constitute interference, for example, or what would not constitute interference under a particular set of circumstances? What precisely do you recall that the city attorney told you?
>
> THE WITNESS: He never give us any examples. I mean, it was more just, you know, sitting down with this and going over the ordinance, you know, what the proof on the ordinance was. I don't recall any, you know, specific examples.
>
> THE COURT: What methods did you carry back to the men that worked under you as to what would constitute a violation of the ordinance?
>
> THE WITNESS: Basically, in roll calls, we just went over the ordinance, read the ordinance to them and because most of them had only seen this here. We went ahead and read the ordinance, you know, as [it] is in the book.
>
> THE COURT: Was there any discussion as to what would constitute interference, or would you leave that up more to the judgment of the officer in a particular situation which might confront him?
>
> THE WITNESS: Yes, sir. Well, as long as he felt that it would fall within the proof of the way the city ordinance read.
>
> THE COURT: I see. All right.

[24] The case against Steven Long of KPRC-TV was dismissed prior to trial, apparently over Sergeant Null's objection (R. III: 68-70). Jimmy Wong of KHOU-TV was acquitted by a jury in 13 minutes (R. II: 109; Pl. Ex. 5).

The Ordinance is enforced by approximately 3,200 officers, who initially receive 18 weeks of training at the Houston Police Academy, 12 hours of which are devoted to "municipal court offenses" (R. III: 76; 84). Although officers must be high school graduates or the equivalent, they may be as young as 19 years old (R. III: 75-76).

(b) Because The Texas Preemption Doctrine Renders The Ordinance Inapplicable To Speech Or Conduct Condemned By The State's Penal Code, Its Patently Illegitimate Reach Dwarfs Its Arguably Permissible Applications.

The final draft of the 1973 Texas Penal Code, submitted to the Texas Legislature by the State Bar Committee on Revision of the Penal Code, was derived in substantial part from the American Law Institute's Model Penal Code. It reflects a studied, conscientious effort to write clear, precise criminal legislation, particularly with respect to minor offenses against public order of the sort historically condemned by so-called "dragnet" laws:[25]

> [A person's] liberty should not be subject to the unconfined discretion of those who enforce the law; the criminal law should be formulated in advance by a democratic lawmaking body . . . Arrest is itself a major sanction . . . and

[25] A dragnet law is a statute or ordinance "designed to cover newly invented crimes, or existing offenses that cannot be readily classified or defined." *People* v. *Tylkoff*, 212 N.Y. 197, 201, 105 N.E. 835, 836 (1914).

> the policeman's need for guidance in this increasingly sensitive area is unusually great. Moreover, persons charged with offenses against public order are commonly tried in justice and corporation courts—where representation by counsel is exceptional; where judges are not always trained in the law; where, at least in urban areas, large caseloads are commonplace; and where appeals to higher courts are rare . . . The committee's principal goal in this chapter has been to apply the usual principles of criminal draftsmanship to minor offenses—offenses that have traditionally been regarded as "catchalls" and that have sometimes been defined with an almost deliberate imprecision . . . On occasion, certainty in the criminal law inevitably involves a cost to law enforcement. [The Code] proceeds on the view that the cost is worth paying, for to underpenalize rather than overpenalize has always been the course of liberty.[26]

By its terms, the Texas Penal Code fairly, clearly, and precisely shields peace officers against actual or threatened physical aggression and the more common forms of provocative conduct or disruptive speech properly within the reach of the criminal law. Houston police officers are entitled to the same protection afforded by state law to citizens generally (and to officers in other Texas cities) against assaultive, annoying, insulting, or other disorderly behavior or language that the Texas Legislature has deemed sufficiently intrusive, both in its intensity and its actual or reasonably threatened consequences, to be punishable as a crime. As the City of Houston Legal Department impliedly recognized in 1981 when it recommended repeal of the law, the Ordinance is an anachronism.

Section 1.08 of the Texas Penal Code (1974) provides that no municipality "may enact or enforce a law that makes any conduct covered by this code an offense subject to a criminal penalty." This state-created preemption doctrine implements a fundamental policy of "statewide uniformity" in the criminal law, *LaRue* v. *State*, 611 S.W.2d 63, 64 (Tex.Cr.App., 1980);

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[26] Committee Comment, "Disorderly Conduct and Related Offenses," *Texas Penal Code, A Proposed Revision*, State Bar Committee on Revision of the Penal Code, Final Draft (West, 1970) at 299-90.

Tex. Penal Code § 1.02(6) (1974), arising from a more comprehensive state constitutional prohibition against enactment of municipal ordinances that are "inconsistent" with the general laws of the state. Tex. Const. Art. XI, § 5 (Vernon, 1955).

Thus, despite the Ordinance's sweeping language, the Texas preemption doctrine precludes its enforcement against an immense range of disruptive speech and conduct that is already criminalized (invariably with greater clarity and precision) by state law.[27] For example, cursing, abusing, or threatening a police officer—or anyone else, for that matter—is a species of disorderly conduct under § 42.01 of the Texas Penal Code. Assaulting or striking a police officer (misbehavior that the literal language of the Ordinance seems to condemn) actually is punishable as either an assault or an aggravated assault under §§ 22.01 and 22.02 of the Code. Threatening a police officer with imminent bodily injury is a simple assault under § 22.01(a)(2) of the Code. As a matter of clearly established Texas law, none of that misconduct is punishable under the Ordinance. *See Knott* v. *State*, 648 S.W.2d 20 (Tex.App.—Dallas, 1983).[28]

Since Texas law precludes application of the Ordinance to any speech or conduct condemned by the Texas Penal Code,

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[27] See, *e.g.*, Tex. Penal Code (1974), §§ 22.01 (Assault); 22.02 (Aggravated Assault, which includes threatening or causing bodily injury to a police officer); 22.03 (Deadly Assault on Law Enforcement or Corrections Officer or Court Participant); 22.05 (Reckless Conduct); 22.07 (Terroristic Threat); 37.08 (False Report to Peace Officer); 38.02 (Failure to Identify as Witness); 38.03 (Resisting Arrest or Search); 38.04 (Evading Arrest); 38.05 (Hindering Apprehension or Prosecution); 38.07 (Escape); 38.08 (Permitting or Facilitating Escape); 38.14 (Preventing Execution of Civil Process); 42.01 (Disorderly Conduct); 42.02 (Riot); 42.03 (Obstructing Highway or Other Passageway); 42.06 (False Alarm or Report).

[28] Hill raised the preemption doctrine in both the District Court (R. II: 151-53) and the Court of Appeals (Brief for Appellant at 13). Presumably for tactical reasons, the City never addressed preemption in its pleadings, briefs, and arguments in the District Court and the Court of Appeals, nor in its jurisdictional statement and brief before this Court.

Since the Ordinance is inapplicable to assaultive or other physical misconduct covered by the Texas Penal Code, the City's assertion at page 10 of its brief that the Court is dealing with a law "prohibiting assaults upon, and interference with, public officers" is, at best, disingenuous.

the Ordinance simply does not reach that wide variety of disruptive speech or threatening conduct that might otherwise be deemed a constitutionally punishable "interruption." Instead, the Ordinance is applicable only to speech or conduct that is not unlawful outside the corporate limits of the City of Houston and that the people of Texas, through their Legislature's enactment of a comprehensive criminal code of statewide application, have not otherwise sought to condemn or punish.

In its ill-concealed effort to rewrite the first amendment doctrine of constitutional overbreadth, the City argues at pages 9 and 19 of its brief that the Ordinance reaches only "core criminal conduct" and that, like the state statute in *New York* v. *Ferber*, 458 U.S. 747, 773 (1982), its "legitimate reach dwarfs its arguably impermissible applications." The City never addresses the preemption doctrine, and with good reason: since the Ordinance is inapplicable to any speech or conduct condemned by state law, it "simply has *no* core," *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974) (emphasis in original) and no "plainly legitimate sweep" *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615 (1973). Because of preemption, the patently illegitimate reach of the Ordinance dwarfs any arguably permissible applications it might otherwise have had.

(c) The Ordinance's Impermissible Sweep Is Demonstrated By The Fact That The Texas Penal Code, The Model Penal Code, The United States Code, And The Criminal Laws Of Virtually All Other States Would Not Condemn Hill's "Verbal Challenge" Of Officer Kelley.

After perfunctorily acknowledging at page 3 of its brief that Hill was found not guilty of "interrupting" Officer Kelley, the City then promptly forgets that troublesome fact and repeatedly argues (at pages 9-12) that Hill was really guilty and that his words were "well within the core area of conduct which the City of Houston, or any other jurisdiction exercising law

enforcement powers, undeniably may prohibit by ordinance"[29]. The City does not cite any examples of "other jurisdictions" that have attempted to criminalize "verbal challenges" of police officers, for a very simple reason: apparently there are none.

Houston seems to be the only one of approximately 1,145 incorporated municipalities in Texas that has implemented an "interrupting" ordinance. It is almost certainly the only Texas city that routinely continued to enforce such a law after the Texas Legislature's enactment in 1973 of the revised Penal Code and its statutory preemption doctrine. Because nothing in the Texas Penal Code even arguably condemns merely "interrupting" or "verbally challenging" a police officer, Hill's words in this case would not have subjected him to arrest or criminal prosecution anywhere else in the state—nor, in all probability, anywhere else in the country.

The Model Penal Code, the United States Code, the proposed Federal Criminal Code, and the criminal laws of virtually every state do not condemn mere spoken words protesting perceived police misconduct.[30] Even under state statutes criminalizing obstruction of police officers in broad, imprecise terms that might conceivably extend to words alone, state courts uniformly have excluded from the ambit of criminality mere

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[29] The City consistently has mischaracterized Hill's speech in this case as criminal "conduct." The record, the fact-findings of the District Court, and the majority and dissenting opinions in the Court of Appeals conclusively demonstrate that Hill was not arrested and prosecuted for criminal misconduct, but for speech alone, i.e., the words he spoke to Officer Kelley. The verdict of the Houston municipal court was that he was not guilty of any crime.

[30] American Law Institute, *Model Penal Code and Commentaries*, § 250.2 (Disorderly Conduct) at 349 ("Altercations and Policemen") (1980). Compare 18 U.S.C. §§ 111 and 1501; *United States* v. *Giampino*, 680 F.2d 898, 902 (2 Cir., 1982); *United States* v. *Varkonyi*, 645 F.2d 453, 457 (5 Cir., 1981); *cf. Miller* v. *United States*, 230 F.2d 486, 488 (5 Cir., 1956). See also the Criminal Code Reform Act of 1981, S.Rep. No. 307, 97th Cong., 1st Sess. (1981) at 296-304 (obstructing a government function by physical interference) and 312-318 (hindering law enforcement) and, *e.g.*, N.Y. Penal Law § 195.05 (1987 McKinney Supp.) (obstructing public official "by means of intimidation, physical force or interference").

speech directed to an officer.[31] Simply criticizing, arguing with, or "verbally challenging" a state or federal officer would not be a crime.[32] At least before this case arose, the overwhelming consensus was that no offense occurs merely because a citizen "complains of the propriety of the officer's actions, asks informational questions of the officer, or requests the officer to release an alleged offender."[33]

(d) The Ordinance Is A Classic Dragnet Law, Not A Non-censorial, Content-Neutral Time, Place, And Manner Regulation.

The Court's decisions implementing the first amendment's guarantee of freedom of expression impose at least three interrelated but conceptually distinct constraints on the exercise of national, state, and municipal legislative power to regulate speech or expressive conduct, either administratively or by the imposition of criminal sanctions.

First, the language of a statute or ordinance affecting first amendment rights must be sufficiently comprehensible that

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[31] See Appendix B of this brief at B-1 and, *e.g.*, *State* v. *Tages*, 10 Ariz. App. 127, 457 P.2d 289, 291-92 (1969); *McCook* v. *State*, 145 Ga. App. 3, 243 S.E.2d 289, 290-91 (1978); *City of Chicago* v. *Brod*, 141 Ill. App. 500 (1908); *Gaston* v. *State*, 123 So.2d 546, 549 (Miss., 1960); *People* v. *Adickes*, 30 N.Y.2d 461, 285 N.E.2d 868, 870 (1972); *State* v. *Leigh*, 278 N.C. 243, 179 S.E.2d 708, 713 (1971); *Pope* v. *State*, 528 S.W.2d 54, 59 (Tenn.Cr.App., 1975); *State* v. *Goodman*, 531 P.2d 478, 479 (Utah, 1975).

[32] "[M]ere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference." *District of Columbia* v. *Little*, 339 U.S. 1, 6 (1950); *Thompson* v. *City of Louisville*, 362 U.S. 199, 206 (1960) ("merely 'arguing' with a policeman is not, because it could not be, 'disorderly conduct' as a matter of [state] law . . ."

See also *The King* v. *Cook*, 11 Can. Crim. Cas. Ann. 32, 33 (B.C. County Ct., 1906) ("policemen are not exempt from criticism any more than Cabinet Ministers") and *Levy* v. *Edwards*, 1 Car. & P. 40, 171 Eng. Rep. 1094 (Nisi Prius 1823), in which Levy, a 19th-century Raymond Wayne Hill, recovered damages of 40 shillings after he told a constable making an arrest, "You have no right to handcuff the boy" and was himself immediately arrested for "insulting the [constable] in the execution of his office."

[33] Note, Types of Activity Encompassed by the Offense of Obstructing a Public Officer, 108 U.Pa.L.Rev. 388, 390-91 (1960) (footnotes omitted).

prospective licensees, administrators, defendants, police, prosecutors, judges, and juries all can understand, follow, and apply the regulatory standards established. That requirement is met only if in virtually all prospective applications of the law men and women of common intelligence need not "guess at its meaning and differ as to its application." *Connally* v. *General Construction Company*, 269 U.S. 385, 391 (1926); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).[34] Although neither due process nor the first amendment demands "impossible standards" of clarity, *United States* v. *Petrillo*, 332 U.S. 1, 7-8 (1947), both require a degree of certainty in statutory language that is at least reasonably possible and practical. *Kolender* v. *Lawson*, 461 U.S. 352, 361 (1983).

Secondly, criminal or other regulatory legislation affecting speech or expressive conduct must be reasonably specific—that is, sufficiently precise to justify a judicial inference that the legislation in its intended application and effect is aimed only at constitutionally unprotected activity, and that in practice, in virtually all prospective applications, it ordinarily will be applied only to such unprotected activity. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *cf. Shapiro* v. *Thompson*, 394 U.S. 618, 631 (1969); *United States* v. *Robel*, 389 U.S. 258, 265 (1967). "Precision of regulation must be the touchstone in [areas] touching our most precious freedoms." *NAACP* v. *Button*, 371 U.S. 415, 438 (1963).

Finally, the twin constitutional requirements of comprehensibility and specificity in legislative enactments affecting speech are complemented by a third, exceptionally important principle that in this case completely eclipses the other two: whatever the legislative language or regulatory mechanism employed, and however understandable and precise it may be, a state or municipality may not consign to the standardless

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[34] The Court has held many times that the requirement of comprehensibility "applies with particular force in review of laws dealing with speech." *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U.S. 610, 620 (1976); *Buckley* v. *Valeo*, 424 U.S. 1, 76-82 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-12 (1973); *Smith* v. *California*, 361 U.S. 147, 151 (1959).

discretion of a public official the decision as to when, where, and under what circumstances people may engage in constitutionally protected speech and conduct. The Court's decisions consistently have stressed this principle in cases involving such diverse first amendment activities as soliciting group memberships or donations and distributing literature,[35] speaking on the street or in a public park,[36] exhibiting motion pictures,[37] possessing or distributing books and magazines,[38] using sound amplification devices,[39] picketing or parading in public,[40] holding public meetings,[41] and hiring a public hall.[42]

The first two constraints—the dual requirements of comprehensibility and specificity—underlie the closely related doctrines of vagueness and overbreadth.[43] When, as in the present case, a legislative enactment applicable to speech and speech-related conduct is unconstitutional on its face under the first amendment for both vagueness and overbreadth, the two prin-

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[35] *E.g., Staub* v. *City of Baxley*, 355 U.S. 313 (1958); *Lovell* v. *City of Griffin*, 303 U.S. 444, 450-51 (1938).

[36] *E.g., Kunz* v. *New York*, 340 U.S. 290, 293-94 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268, 271 (1951).

[37] *E.g., Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 682-83 (1968); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502-04 (1952).

[38] *E.g., Lo-Ji Sales, Inc.* v. *New York*, 442 U.S. 319, 325 (1979); *Stanford* v. *Texas*, 379 U.S. 476, 485-86 (1965).

[39] *E.g., Saia* v. *New York*, 334 U.S. 558, 560-61 (1948).

[40] *E.g., Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 150-51 (1969); *Cox* v. *Louisiana*, 379 U.S. 536, 555-58 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 568-69 (1965).

[41] *E.g., Hague* v. *CIO*, 307 U.S. 496, 516-18 (1939).

[42] *E.g., Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553-55 (1975).

[43] Rotunda, Nowak & Young, *Treatise on Constitutional Law, Substance and Procedure* §§ 20.8, 20.9 (1986); Monaghan, *Overbreadth*, 1981 Sup.Ct.Rev. 1 (1982); Tribe, *American Constitutional Law* §§ 12-24 to 12-30 (1978); Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844 (1970); Note, The Void for Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67 (1960).

ciples are conceptually indistinguishable.[44] A law unconstitutionally vague on its face in such instances will necessarily and inevitably be unacceptably overbroad as well.[45]

The Court has demanded as a precondition even to first amendment attacks on the facial constitutionality of state and local legislation[46] that the law be either substantially vague[47]

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[44] In the area of free speech . . . the doctrines of vagueness and overbreadth frequently overlap. A vague or imprecise statute addressed to conduct abutting constitutionally protected activity is, precisely because it is vague, very likely to cast a shadow of illegality over the protected activity and thus to be susceptible to attack on grounds of overbreadth as well as vagueness. For this reason, the distinction between the two doctrines tends to become blurred in this context.

American Law Institute, Model Penal Code and Commentaries (1980) § 250.2 at 339 n. 45; Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. at 873 (vagueness doctrine "has been almost wholly merged with the overbreadth doctrine when statutes concerning first amendment rights are at issue").

See, in this regard, *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 6 (1982) ("the vagueness of a law affects overbreadth analysis"); *Kolender* v. *Lawson*, 461 U.S. 352, 358-9, n. 8 (1983) (Supreme Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines"); *Cox* v. *Louisiana*, 379 U.S. 536, 551 (1965) (statute "unconstitutionally vague in its overly broad scope").

[45] The converse is not true: a law unconstitutional on its face under the first amendment for overbreadth is not necessarily or even probably apt to be substantially vague. *See, e.g., Secretary of State of Maryland* v. *Joseph H. Munson Company, Inc.*, 467 U.S. 947 (1984); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975); *Zwickler* v. *Koota*, 389 U.S. 241 (1967).

[46] Federal legislation alleged to be substantially vague or overbroad on its face ordinarily may be authoritatively construed by this Court to avoid constitutional infirmity. See, *e.g., United States* v. *Grace*, 461 U.S. 171 (1983); *Arnett* v. *Kennedy*, 416 U.S. 134, 162 (1974); *United States* v. *National Dairy Products Corporation*, 372 U.S. 29, 32-33 (1963).

This circumstance explains why decisions invalidating federal statutes on their face are comparatively few and far between. *E.g., Regan* v. *Time, Inc.*, 468 U.S. 641, 648-49 (1984); *United States* v. *Cardiff*, 344 U.S. 174 (1952); *United States* v. *L. Cohen Grocery Company*, 255 U.S. 81 (1921).

[47] Although the Court has never explicitly articulated a principle of "substantial vagueness" corresponding to the doctrine of "substantial overbreadth," such a limitation is implicit in the Court's previous decisions.

or substantially overbroad or both. "[T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to [a facial] challenge . . . [Instead], there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged . . ." *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 800-01 (1984). In other words, the law must "[reach] a substantial amount" of constitutionally protected speech or expressive conduct. *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982).

The Ordinance in this case, by virtue of the standardless discretion it confers, is different in principle, rather than in degree, from the state legislation sustained in *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), and *New York* v. *Ferber*, 458 U.S. 747 (1982).[48] It is not merely that the Ordinance is vague, indefinite, and overbroad on its face because of "portmanteau words." *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 532 (1952) (concurring opinion of Justice Frankfurter). It is that it is meant to be so—indeed, must be so if it effectively is to accomplish its intended purpose. This is a dragnet law—a misdemeanor carrying a relatively minor statutory penalty (and therefore unlikely to precipitate appeals), deliberately designed to give local police virtually unlimited discretion to make arrests for speech or expressive conduct that the more precisely drafted provisions of the Texas Penal Code would not condemn.

The City conceded as much in its brief before the Court of Appeals: "The words [of the Ordinance] may properly be a little

[48] The statutes in both *Broadrick* and *Ferber*, while arguably overbroad, were in no meaningful sense vague or uncertain. See, *e.g.*, *Broadrick*, 413 U.S. at 607 (characterizing the vagueness claim as "all but frivolous"). The statute in *Brockett* was ambiguous, but only as between two alternative constructions (i.e., did the word "lust" reach "normal sexual responses" or not?). Compare *Baggett* v. *Bullitt*, 377 U.S. 360, 378 (1964) (challenged oath open not "to one or a few interpretations, but to an indefinite number").

imprecise if vagueness is reasonably necessary to embrace all of its legitimately intended objectives . . . (Brief for Appellee at 13). The Court has never had the slightest difficulty in recognizing and dealing with such laws.[49] Throughout this century it has repeatedly and consistently struck them down as unconstitutional on their face.[50]

[49] See *Lewis* v. *City of New Orleans*, 415 U.S. 130, 136 (1974) (concurring opinion of Justice Powell) (the "opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident"); *Winters* v. *New York*, 333 U.S. 507, 540 (1948) (dissenting opinion of Justice Frankfurter) ("[t]hese statutes are in a class by themselves, in view of the familiar abuses to which they are put").

[50] *Kolender* v. *Lawson*, 461 U.S. 352 (1983) ("credible and reliable identification"); *Smith* v. *Goguen*, 415 U.S. 566 (1974) ("treats contemptuously" the flag); *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974) ("obscene or opprobrious language"); *Plummer* v. *City of Columbus*, 414 U.S. 2 (1973) ("menacing, insulting, slanderous, or profane language"); *Brown* v. *Oklahoma*, 408 U.S. 914 (1972) ("any obscene or lascivious language or word" in public "or in the presence of females"); *Rosenfeld* v. *New Jersey*, 408 U.S. 901 (1972) ("loud and offensive or profane or indecent language") *Gooding* v. *Wilson*, 405 U.S. 518 (1972) ("opprobrious words or abusive language, tending to cause a breach of the peace"); *Cason* v. *City of Columbus*, 409 U.S. 1053 (1972) (same); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972) ("wandering or strolling around from place to place without any lawful purpose or object"); *Coates* v. *City of Cincinnati*, 402 U.S. 611 (1971) (sidewalk assemblies of three or more "annoying to persons passing by"); *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966) ("some misconduct"); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) ("subversive organization"); *Butler* v. *Michigan*, 352 U.S. 380 (1957) ("obscene, immoral, lewd or lascivious" language or pictures "manifestly tending to the corruption of the morals of youth"); *Winters* v. *New York*, 333 U.S. 507 (1948) (publications "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime"); *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) ("gangsters"); *Stromberg* v. *California*, 283 U.S. 359 (1931) (display of banner "as sign, symbol or emblem of opposition to organized government or as an invitation or stimulus to anarchistic action or as an aid to propaganda that is of a seditious character"); *Connally* v. *General Construction Company*, 269 U.S. 385 (1926) ("current rate of per diem wages in the locality").

See also the loyalty oath cases, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967) ("treasonable or seditious utterances or acts"); *Baggett* v. *Bullitt*, 377 U.S. 360 (1964) ("respect for the flag and the institutions" of government; "reverence for law and order"); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961) (knowingly "aiding" the Communist Party), and the administrative licensing cases, nn. 35-37, *supra*.

Because the operative words of the Ordinance are self-evidently neither reasonably clear nor sufficiently precise, they are plainly "open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation . . ." *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981); *Regan* v. *Time, Inc.* 468 U.S. 641, 648-49 (1984); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984).[51] Any verbal "interruption" that a Houston police officer regards as sufficient to provide colorable justification for arrest and prosecution, even though not a violation of the Texas Penal Code, will necessarily and inevitably provide the standard of criminality under the Ordinance, whenever, wherever and in whatever manner it occurs. In each case it is the officer's judgment and discretion alone, exercised in accordance with no objective standard whatever, that determine whether or not people will go to jail.[52] In a quite literal sense, Houston has "entrusted [law-making] to the moment-to-moment judgment of the policeman on his beat," *Gregory* v. *City of Chicago*, 394 U.S. 111, 120 (1969) (concurring opinion of Justice Black), and allowed people to be arrested and jailed "for no more than vindicating affronts to police authority." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 167 (1972).

The City's reliance on *Colten* v. *Kentucky*, 407 U.S. 104 (1972) is misplaced. Colten was arrested for disorderly conduct after repeatedly refusing a police directive to leave the scene of a roadside traffic stop where a friend was receiving a ticket. The Kentucky court had construed the statute as a valid time, place, and manner regulation by limiting its application to constitutionally unprotected conduct. This Court accepted the Kentucky court's determination that "when arrested [Colten]

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[51] *See, e.g., Grayned* v. *City of Rockford*, 408 U.S. 104 (1972); *Cameron* v. *Johnson*, 390 U.S. 611 (1968); *Adderley* v. *Florida*, 385 U.S. 39 (1966); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Poulos* v. *New Hampshire*, 345 U.S. 395, 404-05 (1953); *Cox* v. *New Hampshire*, 312 U.S. 569, 575-76 (1941).

[52] The District Court in this case referred to Officer Kelley's decision to arrest Hill as "just a judgment on [his] part" (J.A. 80).

was not engaged in activity protected by the First Amendment" and concluded that "the police had cause for apprehension that a roadside strip, crowded with persons and automobiles, might expose the entourage, passing motorists, and police to the risk of accident." 407 U.S. at 109. In the present case, by contrast, Hill was not arrested for refusing to leave the scene of a police-citizen confrontation[53] but "merely because he verbally and negatively protested Officer [Kelley's] treatment" of Charles Hill by "voicing his objection to what he obviously felt was a highly questionable detention by a police officer." *Norwell* v. *City of Cincinnati*, 414 U.S. 14, 16 (1973).

The Texas Penal Code provides comprehensive protection for all state law enforcement officials. If Houston really wishes to afford its police officers even greater security (and its decision to repeal the Ordinance in 1981 suggests strongly that it does not), then it certainly may do so "by a narrowly drawn statute tailored precisely toward the conduct the City wishes to proscribe." *Hill* v. *City of Houston*, 789 F.2d at 1113 (J.S. at A-21). "It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971).

A law that purports on its face to authorize arrest and criminal prosecution for "verbal challenge" of a police officer cannot stand. Its existence is an affront to the first amendment and to the right of free expression it guarantees.

(2) The Abstract Possibility That The Ordinance Might Be Clarified Or Limited To Constitutional Dimensions In A Single State Adjudicative Proceeding Within The Foreseeable Future Is So Remote As To Be Practically Nonexistent.

In attempting to accommodate the competing individual and governmental interests implicated by any regulation of speech,

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[53] The Court of Appeals panel unanimously agreed that the record does not establish that Hill was ordered to leave the scene or forewarned that his refusal to do so would result in arrest. 764 F.2d at 1159, 1165 (dissenting opinion). The District Court's fact-finding to the contrary (J.S. at B-2) is clearly erroneous.

the Court "has held that a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts . . . and its deterrent effect on legitimate expression is both real and substantial." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-15 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 497 (1965). While conceding that its Ordinance reaches constitutionally protected speech, the City nevertheless maintains that it is "readily subject" to a clarifying or narrowing construction that would eliminate, or at least substantially ameliorate, its potential for unconstitutional application to protected speech or expressive conduct.

The problem with that argument is that "no readily apparent construction suggests itself as a vehicle for rehabilitating the [Ordinance] in a single prosecution." *Dombrowski* v. *Pfister*, 380 U.S. 479, 491 (1965). Precisely as in *Baggett* v. *Bullitt*, 377 U.S. 360, 378 (1964),

> the uncertain issue of state law does not turn upon a choice between one or several alternative meanings of a state statute. The challenged [Ordinance] is not open to one or a few interpretations, but to an indefinite number . . . In these circumstances it is difficult to see how an abstract construction of the challenged terms [in a single state proceeding] could eliminate the vagueness from these terms. It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the [Ordinance] within the bounds of permissible constitutional certainty.

"In such a case a single adjudication by a state court could eliminate the constitutional difficulty." *Procunier* v. *Martinez*, 416 U.S. 396, 401 n. 5 (1974). "If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation." *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965).

(a) Because The Ordinance Reaches Constitutionally Protected "Verbal Challenges" Of Police Officers, The City's Proposed Limiting Constructions Would Not Cure Its Principal Vice, *i.e.*, The Standardless Discretion It Confers.

The City is quite correct in asserting that the Ordinance must be read to incorporate the explicit *scienter* requirements prescribed by §§ 6.02 and 6.03 of the Texas Penal Code. *Honeycutt* v. *State*, 627 S.W.2d 417 (Tex.Cr.App., 1981); *Pollard* v. *State*, 687 S.W.2d 373 (Tex.App.—Dallas, 1985, *pet. ref'd*). But the City is altogether wrong in its uncritical assumption that the imposition of such a *scienter* requirement, or the possible adoption of the other "limiting constructions" proposed by the dissenting opinion in the Court of Appeals, would confine the Ordinance to constitutional proportions. On the contrary, such proposed "limiting constructions" highlight the two fundamental and incurable deficiencies in the law: it is applicable by its terms to constitutionally protected speech, and it confers standardless discretion on police officers to arrest and prosecute for such speech.

Even if coupled with exclusions of "trivial, insignificant, or inadvertent" verbal disruptions, or speech protesting unlawful police misconduct, 789 F.2d at 1124 (dissenting opinion) (J.S. at A-47, 48), the imposition of an explicit *scienter* requirement would not confine the Ordinance to constitutional dimensions. Apart from the practical impossibility of formulating a coherent test for distinguishing between "trivial" and "substantial" interference by speech alone, such supposed limitations would in no way diminish the Ordinance's principal vice, *i.e.*, the virtually standardless discretion it confers on police officers to decide when the degree, duration, or intensity of verbal "interruption" become sufficiently harmful to warrant arrest and criminal prosecution. A citizen's words may be intended deliberately to "interrupt" a lawful police investigation and yet still be protected by the first amendment—for example, Hill's protest against what he perceived to be Officer Kelley's racially motivated misconduct in this case.

(b) Appeals From Municipal Court Convictions Will Not Result In An Acceptable Clarifying Or Limiting Construction Of The Ordinance By A Texas Appellate Court.

Before 1976, an appeal from a conviction under the Ordinance in a case implicating first amendment rights would have been relatively simple. Houston municipal courts were not courts of record, and a defendant convicted following a jury or non-jury trial needed only to file a timely appeal bond to perfect an appeal to the County Criminal Court at Law of Harris County, where the accused was entitled to a trial *de novo* on the municipal court complaint. Arts. 4.08; 44.13, 44.17, 45.10, Tex.C.Cr.P. (1979). In fact, a defendant could plead guilty or *nolo contendere*, file the appeal bond, and bypass the municipal courts altogether. However, in the event of conviction in the County Criminal Court at Law, a defendant was entitled to appeal to the Court of Criminal Appeals of Texas, the State's highest appellate court in criminal cases, only if the fine imposed exceeded $100.00. Art. 4.03, Tex.C.Cr.P. (1979), *amended* by Acts 1981, 67th Leg., p. 802, ch. 291, § 102, eff. Sept. 1, 1981.

No known appeal, even as far as the County Criminal Court at Law, was taken from a conviction under the Ordinance between 1887 and 1976, when Houston municipal courts became courts of record and appellate procedures were significantly revised.[54] Before 1976 appeals were merely improbable.

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[54] A conviction under the Ordinance still may be appealed to the County Criminal Court at Law of Harris County, but now only "on the basis of errors that are set forth in the defendant's motion for new trial and are presented in the transcript and statement of facts [transcription of testimony] prepared from the municipal court of record proceedings leading to the conviction." Tex. Government Code § 30-269(d), (Vernon Supp. 1986). To perfect an appeal, the defendant must file a timely written motion for new trial within ten days after his conviction; "a point of error not distinctly set forth in the motion is waived." § 30.269(c). The accused must then give notice of appeal, § 30.269(d), and, not later than ten days after the motion for new trial is overruled, post an appeal bond in the amount of $50.00 or double the amount of the fine and costs imposed, whichever is greater. § 30.270(b).

A convicted defendant must then arrange for preparation of the transcript and statement of facts (if a court reporter was requested to record the proceedings at trial) and file them with the Clerk of the municipal court within sixty days after giving notice of appeal. § 30.272(a). The accused must then file a written appellate brief not later than 15 days after the filing of the record § 30.274(b). The prosecuting attorney files a brief, and the County Criminal Court at Law then affirms, modifies, or reverses the conviction and fine imposed in the Houston municipal court on the record before it. Only if the fine imposed in the municipal court exceeds $100.00 may a defendant appeal an affirmance of the conviction by the County Criminal Court at Law to one of the two intermediate Texas Courts of Appeals in Houston, § 30.278, or thereafter seek discretionary review of any adverse decision in the Court of Criminal Appeals of Texas in Austin. Tex.Const., Art. V, § 5 (Vernon Supp. 1987).

They are now a virtual impossibility, because the only people likely to be found guilty under this Ordinance are those least likely to appeal—that is, those without lawyers. Indigent, illiterate, or non-English-speaking defendants without counsel cannot realistically be expected to clear the substantial procedural hurdles to perfecting an appeal to the County Criminal Court at Law, even if they were prepared to attempt to do so in order to challenge a fine that can never exceed $200.00 and that most frequently falls in the range of $25.00 to $75.00 and is therefore unappealable beyond the County Criminal Court at Law.

On the other hand, in many cases, defense attorneys presumably can persuade the city attorney or municipal court judge to dismiss the prosecution on a legal technicality (for example, because of a defect in the complaint or under the preemption doctrine)[55] or can demand a trial, in which event the defendant frequently will be found not guilty.[56] In a substantial number of instances the cases are dismissed because the arresting officer does not appear for trial (R. II: 154, 162).

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[55] Defendants not represented by lawyers generally lose the benefits of the preemption doctrine because the prosecutor ordinarily demands that "the Judges [dismiss because of preemption] on motion of the defense counsel" (R. II: 152-53).

[56] Since approximately 5,000 cases (including prosecutions for traffic offenses) are filed *every day* in Houston's municipal courts (R. II: 133), an attorney's demand for trial by itself frequently should precipitate a dismissal (R. II: 154).

Thus, in its practical operation and effect, the Ordinance is inherently unlikely to generate any appeals at all, much less first amendment appeals in which the language of the Ordinance realistically might be construed, clarified, or narrowed by a higher court. Most persons accused of substantial disruptions of police investigations are charged under the Texas Penal Code, which generally imposes significantly greater penalties. Of those charged under the Ordinance, many will believe themselves guilty and therefore will plead guilty or no contest and pay a fine. If a defendant's arrest for "interrupting" is questionable, the prosecutor or judge ordinarily will dismiss the case or acquit the accused. In marginal cases, even without counsel, the defendant frequently will be exonerated. The triviality of the fine by itself discourages defendants from undertaking the expense and inconvenience of hiring an attorney, contesting their guilt in a trial, or appealing any resulting conviction.[57] At that point, it is simply much easier to pay the fine and forget the matter.

The foregoing circumstances explain why in 100 years the Ordinance has never been authoritatively construed, limited, or clarified by any Texas appellate court, and why no definitive construction of its operative language will result from any future conviction or appeal. Such a "limiting construction" would require (1) a defendant charged under the Ordinance for (2) engaging in speech or expressive conduct implicating first amendment rights, who (3) retains counsel, and who (4) despite representation by a lawyer, is convicted and sentenced to (5) a fine exceeding $100.00, and who then (6) appeals to the County Criminal Court at Law, where (7) his conviction and sentence are affirmed, and who then (8) appeals to the Court of Appeals of Texas, where, if the conviction is not reversed for insufficient evidence, or on some other unrelated ground, (9) the Court

[57] "The fact the ordinance punishes as misdemeanors its violations and limits fines to $200 does not diminish the chill the enforcement of the ordinance creates. The real penalty is a trip to the city jail in the back of a squad car and having to post bond even if one later protests the charge and is found innocent." *Hill v. City of Houston*, 789 F.2d at 1110 (J.S. at A-16).

supposedly will "construe" the Ordinance and limit it to constitutional dimensions. The prospect of such a nine-step "limiting construction" ultimately materializing is essentially fictional.

The City's assertion in its brief (at page 32) that "Texas courts certainly have not declined to construe or limit the ordinance" is demonstrably false. When a Houston television news photographer accused under the Ordinance moved to dismiss the complaint "for constitutional vagueness" (R. II: 104-05; Pl. Ex. 5), the motion was denied, and the municipal court's charge to the jury simply tracked the literal language of the complaint filed by the arresting officer (Pl. Exs. 3, 4). Thus, it is indisputable that the City's own municipal courts of record have specifically declined to clarify or limit the Ordinance, and, though afforded an opportunity to do so, have never even attempted to perform what necessarily would amount to "a remarkable job of plastic surgery upon the face of the ordinance." *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969).[58] Until this case arose, the Ordinance was effectively impervious to constitutional attack in the Texas courts, even though it generated approximately 1,000 arrests and prosecutions a year.[59]

(c) Texas Courts Cannot Impose A Clarifying Or Limiting Construction On The Ordinance In A Civil Declaratory Judgment Or Injunction Proceeding.

The Texas Constitution of 1876, as amended in 1891, creates two separate courts of last resort in civil and criminal cases, the

[58] Both the City and the dissenting judges in the Court of Appeals casually have assumed that only a Texas appellate court can provide an authoritative clarifying or limiting construction of the Ordinance's language, if one is realistically possible. Obviously the City's municipal judges might authoritatively "construe" the Ordinance, but they have never done so. They simply apply it as written.

[59] The City implies with tongue in cheek at pages 32 and 37 of its brief that the Ordinance may be so constitutional that no one has ever before thought to challenge it on first amendment grounds in the Texas courts. Certainly Hill has not needed to do so; upon each of his appearances in the Houston municipal courts, the case against him has been dismissed, or he has been found not guilty.

Supreme Court and the Court of Criminal Appeals, whose jurisdictions are mutually exclusive. *Tex. Const.*, Art. V, §§ 1, 3 and 4. While Texas has adopted the Uniform Declaratory Judgments Act, *Tex. Civil Practice and Remedies Code §§ 37.001 et seq. (1986)*, adjudication of the meaning or possible applications of a criminal statute or ordinance in a civil proceeding inevitably would create actual or potential jurisdictional conflicts between the state's highest courts. As a consequence, the Supreme Court of Texas consistently has held that equitable relief will not be granted to restrain the enforcement even of unconstitutional criminal statutes unless they threaten irreparable injury to vested property rights and, as a corollary, repeatedly has disapproved the construction of criminal statutes in civil declaratory judgment actions.[60]

Even more significantly, in state civil suits for anticipatory injunctive or declaratory relief, the Texas judiciary has imposed justiciability and case-or-controversy requirements that are virtually indistinguishable from those governing federal adjudication. Texas courts do not render advisory opinions,[61] nor do they decide abstract or hypothetical questions "not then essential to the decision of an actual controversy, although such questions may in the future require adjudication." *Firemen's Insurance Company of Newark* v. *Burch*, 442 S.W. 2d 331, 333 (Tex., 1968); *cf. United Public Workers* v. *Mitchell*, 330 U.S. 75, 89-91 (1947). In light of these firmly established state adjudicatory policies, the possibility of a Texas court undertaking an abstract interpretation, clarification, or limitation of the Ordinance's operative language, not as applied to an existing controversy but to future speculative or hypothetical states of affairs, is so remote as to be practically nonexistent.

[60] *Dearing* v. *Wright*, 653 S.W.3d 288, 289 n.2 (Tex., 1983); *Texas Liquor Control Board* v. *Canyon Creek Land Corporation*, 456 S.W.2d 891, 894 (Tex., 1970); *City of Fort Worth* v. *Craik*, 411 S.W.2d 541, 542 (Tex., 1967); *State* v. *Logue*, 376 S.W.2d 567, 569-70 (Tex., 1964); *Crouch* v. *Craik*, 369 S.W.2d 311, 315 (Tex., 1963); *Kemp Hotel Operating Company* v. *City of Wichita Falls*, 141 Tex. 90, 170 S.W.2d 217, 219 (1943). See also *Malone* v. *City of Houston*, 278 S.W.2d 204, 205-06 (Tex.Civ.App.—Galveston, 1955, error ref'd, n.r.e.).

[61] *United Services Life Insurance Company* v. *Delaney*, 396 S.W.2d 855 (Tex., 1965); *California Products, Inc.* v. *Puretex Lemon Juice, Inc.*, 160 Tex. 586, 334 S.W.2d 780 (1960); *Morrow* v. *Corbin*, 122 Tex. 553, 62 S.W.2d 641 (1933).

The City is mistaken in its offhand assertion that "an action can always be brought in *state* court under 42 U.S.C. § 1983 for a determination of [the] ordinance's meaning" (Brief for Appellant at 33; emphasis in original). It is still an open question whether a state court is required to entertain claims under § 1983. *Martinez* v. *California*, 444 U.S. 277, 283 n. 7 (1980). It is highly unlikely that a Texas court would be required to so do if it does not have jurisdiction adequate and appropriate under established local law to adjudicate the action. *Testa* v. *Katt*, 330 U.S. 386, 394 (1947). Texas courts have entertained § 1983 suits—*Sullivan* v. *University Interscholastic League*, 616 S.W.2d 170 (Tex., 1981); *Jennings* v. *Garner*, No. 12-85-0214-CV, Tex.App.—Tyler, Oct. 31, 1986—but these cases have not required them to construe criminal legislation in a civil proceeding when the state's well-established practice forbids such a result. As the Supreme Court of Texas observed in a related context, "not even the Supreme Court of the United States can confer upon [a Texas court] a power or jurisdiction beyond the limitations imposed by the source of its existence." *Pope* v. *Ferguson*, 445 S.W.2d 950, 952 (Tex., 1969), *cert. denied*, 397 U.S. 997 (1970).

(d) Newly Created Texas Certification Procedures Will Not Provide A Clarifying Or Limiting Construction Of The Ordinance.

In November, 1985, more than four months after a panel of the Court of Appeals declared the Ordinance unconstitutional on its face, the voters of Texas approved a state constitutional amendment, effective January 1, 1986, authorizing both the Supreme Court and the Court of Criminal Appeals to "answer questions of state law certified from a federal appellate court" and to "promulgate rules of procedure relating to the review of those questions." *Tex. Const.*, Art. V, § 3-c (Vernon Supp. 1986). On May 30, 1986 such rules were adopted by both of

Texas' highest courts as Rules 114 and 214 of the Texas Rules of Appellate Procedure, effective January 1, 1987.[62]

Like a declaratory judgment, certification may obviate the need for federal constitutional adjudication if the resolution of a single, discrete issue of state law (or, at least, a conceptually manageable number of such issues), arising from an actual case or controversy before a federal court, might provide an alternative ground for decision. In such cases an authoritative "yes or no" answer from the state court could be dispositive. See, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491 (1985), in which the question certified to the Washington Supreme Court might have been, "Does the word 'lust' in the Washington moral nuisance law comprehend normal sexual responses?"

By contrast, an ordinance unconstitutional on its face under the first amendment for both vagueness and overbreadth is not open "to one or a few interpretations, but to an indefinite number." *Baggett* v. *Bullitt*, 377 U.S. 360, 378 (1964). Certification would present the Court of Criminal Appeals with essentially hypothetical questions concerning the meaning, scope, and theoretical reach of the Ordinance's language, considered "abstractly and without reference to concrete, particularized situations so necessary to bring into focus the impact of the terms on constitutionally protected rights of speech and association." *Id.* at 378. Particularly in view of the consistent refusal of the Court of Criminal Appeals to render declaratory judgments on issues of criminal law,[63] and the Texas judiciary's historical aversion to advisory opinions, there is no realistic likelihood that certified questions to the Court of Criminal

[62] Rule 214, establishing rules for certification of criminal law questions to the Court of Criminal Appeals, is virtually identical to Rule 114, governing certification to the Supreme Court of Texas, and is reproduced as Appendix C of this brief at C-1. As in most other states, each Texas court has reserved the option, "in its discretion, [to] decline to answer the questions certified to it."

[63] Ex parte Conner, 439 S.W.2d 350 (Tex.Cr.App., 1969); Ex parte Usener, 391 S.W.2d 735 (Tex.Cr.App., 1965); *State* v. *Parr*, 293 S.W.2d 62 (Tex.Cr.App., 1956); *cf. Stewart* v. *State*, 718 S.W.2d 286, 288 n.2 (1986) (declining to "address speculative instances" in which a criminal statute might not apply).

Appeals at this eleventh hour would materially change the character of the constitutional issues presented by the Ordinance.[64]

(3) The City's Strategic Decision Not To Invoke The Abstention Doctrine Until After The Adverse Decision On The Merits By The Court Of Appeals Should Be Regarded As An Unexcused Procedural Default That Now Bars Assertion Of The Claim.

The City opens its analysis of the abstention doctrine by feigning surprise and saying "the majority below, remarkably, did not discuss that issue" (Brief for Appellant at 33). What the City does not say is that the dissenting judges also did not discuss abstention, for an obvious reason the City is understandably reluctant to acknowledge: its claim was indefensibly out of time.

During almost 39 months of litigation that preceded the initial decision of the Court of Appeals, the City never once contended, directly or indirectly, expressly or by implication, that the federal courts should defer adjudicating the facial constitutionality of the Ordinance pending some future clarifying or limiting state court construction of it. Rather, the City took precisely the opposite position—until it lost the case on the merits.

The City's answer in the District Court makes no reference to any supposed basis for abstention. Instead, it admits "the Court has jurisdiction of the plaintiff's federal claims against [the City]" and maintains that the Ordinance "is constitutional" (R. I: 125, 127-128). The joint pretrial order required by the local rules of the District Court (R. I: 83), drafted by the City, signed by counsel for the parties, and specifically and comprehensively delineating the legal and factual issues to be

[64] Since the supposed "limiting construction" advanced by the City and the dissenting judges below would not adequately exclude protected speech from the Ordinance's reach, it is difficult to imagine how certified questions could be formulated at all—other than by asking, in essence, "What does this Ordinance mean?"

resolved at trial, contains no reference to abstention or any other hint that the City desired postponement of the exercise of federal jurisdiction pending state court consideration of the Ordinance. On the contrary, the City's proposed findings of fact and conclusions of law that it submitted following the trial maintain that the Ordinance is neither vague nor overbroad on its face under the first amendment and request the District Court to so hold (R. I: 33; 43-48).

As the result of the City's consistent and undeviating position, and its apparent strategic determination not to invoke the abstention doctrine at trial, the District Court's decision on the merits does not mention abstention even in passing. In its brief and oral argument before the panel of the Court of Appeals, the City never suggested the propriety of abstention but instead asked for a decision on the merits, affirming the constitutionality of the Ordinance.[65] In short, from all that appeared from any written or spoken manifestation of its views during the more than three years that preceded the panel opinion, the City was perfectly content to have the constitutional issues in this case resolved in the federal courts.

With the publication of the panel and dissenting opinions in the Court of Appeals, the City's strategic posture underwent a lycanthropic metamorphosis. An Ordinance that before the panel opinion "could not and should not be more definite" and that was justifiably "a little imprecise . . . to embrace all of its legitimately intended objectives" (Brief for City at 13) suddenly evidenced "a sufficient degree of ambiguity" to warrant abstention (City's Suggestion for Rehearing En Banc at 10). An Ordinance that previously did not "reach more broadly than is reasonably necessary to protect legitimate governmental interests" (Brief for City at 16) now somehow required "a limiting construction" in order to "pass constitutional muster" (City's Suggestion for Rehearing En Banc at 9).

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[65] "The City's position is that . . . the ordinance is not unconstitutionally vague; that it is not overbroad; and that is is not unconstitutional as applied." (Brief for City of Houston at 11).

In short, an appeal that before the panel opinion warranted resolution of the merits of the federal constitutional claims presented, at least so long as the outcome was potentially favorable to the City, was mysteriously transmogrified upon the appearance of that opinion into an appeal requiring remand, dismissal, and indefinite postponement of the exercise of federal civil rights jurisdiction until a Texas appellate court—somehow, somewhere, some way, some day—"construes" the Ordinance in a manner that allegedly will make it comprehensible and precise. This result supposedly is appropriate, not because the Ordinance is facially constitutional (the City unwittingly concedes that it is not), but because after 100 years the City, its municipal courts, and the Texas appellate courts ostensibly have not been provided with a "fair opportunity" to limit the Ordinance to constitutional dimensions.[66]

Particularly in view of the City's aborted determination to repeal the Ordinance before Hill's arrest in this case, this sort of light-hearted procedural gamesmanship simply cannot be taken seriously. No variant of the abstention doctrine permits a municipality unilaterally to veto an adverse decision by a Court of Appeals on the merits of a constitutional claim, after having willingly accepted federal jurisdiction in the case for more than three years. "If the State [or a municipality] voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Services* v. *Hodory*, 431 U.S. 471, 480 (1977); *Ohio Civil Rights Commission* v. *Dayton Christian Schools, Inc.*, 477 U.S. ——, ——, 106 S.Ct. 2718, 2722, 91 L.Ed.2d 512, 521 (1986); *Brown* v. *Hotel Employees*, 468 U.S. 491, 500 n. 9 (1984). Acceptance of the City's position would provide an incentive for state and local governments sued for civil rights violations occasioned by vague or overbroad laws to submit to the exercise of federal jurisdiction only so long as they expect to prevail on the merits,

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[66] The degree of seriousness which the City itself attaches to its abstention claim may be accurately gauged by its request that the Court affirm the judgment of the District Court on the merits (Brief for Appellant at 42).

but then to invoke abstention, at any stage of the proceedings, whenever they lose.

In an equivalent procedural context involving strategic withholding of claims by defense counsel in state criminal prosecutions, the Chief Justice has characterized this sort of tactical maneuver as "sandbagging." *Wainwright* v. *Sykes*, 433 U.S. 72, 89 (1977). Just as unexcused procedural defaults by private counsel preclude untimely revival of a position that might have been deemed meritorious if asserted earlier in the case, *e.g. Murray* v. *Carrier*, 477 U.S. ____, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986); *Smith* v. *Murray*, 477 U.S. ____, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986); *Engle* v. *Isaac*, 456 U.S. 107, 128-29 and n. 34 (1982), so do similar unexplained and unexcused lapses by government counsel. *E.g., Steagald* v. *United States*, 451 U.S. 204, 211 (1981) (government counsel lost right to raise issue of standing "[through] assertions, concessions, and acquiescence"). The City's delay in these circumstances constitutes an equivalent procedural default, precluding consideration of its belated abstention request.

Of course, abstention is an equitable doctrine, and in a proper case it may be invoked by the Court *sua sponte*, whether or not a party to the litigation has laid claim to it. *Bellotti* v. *Baird*, 428 U.S. 132, 143 n. 10 (1976). For example, a federal appellate court might find abstention appropriate in a case involving a preenforcement challenge to recently enacted state criminal or regulatory legislation, even in the absence of a timely demand by counsel, to provide state courts with a fair opportunity either to interpret the law or to apply it to a concrete set of facts. *See, e.g., Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, ____, 105 S.Ct. 2794, 2804, 86 L.Ed.2d 394, 408 (1985) (concurring opinion of Justice O'Connor); *Red Bluff Drive-In, Inc.* v. *Vance*, 648 F.2d 1020, 1032-36 (5 Cir., 1981), *cert. denied sub nom. Theatres West, Inc.* v. *Holmes*, 455 U.S. 913 (1982); *cf. Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979).

But this is simply not an instance in which such exceptional circumstances would justify a departure from the Court's usual

practice of refusing to consider questions not properly presented to and passed upon by the Court of Appeals. *Duignan* v. *United States*, 274 U.S. 195, 200 (1927). The abstention claim the City now belatedly presses on this Court was not considered, ruled upon, or adverted to by the District Court or by even one of the 15 judges of the Court of Appeals because of its obvious untimeliness. The City's "proposal [came more than] three years after the filing of the complaint and would produce delay attributable to abstention that the Court in recent years has sought to minimize." *Mayor* v. *Educational Equality League*, 415 U.S. 605, 628 (1974). Indeed, there is persuasive authority suggesting that abstention is never appropriate in cases presenting substantial first amendment vagueness-overbreadth claims. *Zwickler* v. *Koota*, 389 U.S. 241, 248-52 (1967); *Dombrowski* v. *Pfister*, 380 U.S. 479, 489-92 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360, 375-79 (1964).[67]

Apart from its untimeliness, the City's abstention claim arises from the mistaken premise that Texas courts are more qualified and better able than the Houston City Council to determine the character and scope of protection that should be afforded to Houston police officers by the criminal law. Texas courts are not the only agencies of that state's government that must be assumed to have capacity to govern. Time and again the Court has expressed its preference, not for a judge's "remarkable job of plastic surgery upon the face of [an] ordinance," *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147, 153 (1969), but for "a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed."[68] Rather than pursuing that

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[67] Instead of "construing" the Ordinance, a Texas court presented with Hill's claims might simply declare it unconstitutional on its face. *Hill* v. *City of Houston*, 789 F.2d at 1126 n.8 (dissenting opinion). But "the mere possibility that a state court might declare the [Ordinance] unconstitutional is no ground for absention." *Procunier* v. *Martinez*, 416 U.S. 396, 401 (1974); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 439 (1971).

[68] *Edwards* v. *South Carolina*, 372 U.S. 229, 236 (1963); *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965); *Adderley* v. *Florida*, 385 U.S. 39, 42 (1966); *Cameron* v. *Johnson*, 390 U.S. 611, 617 (1968); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971).

preferred course, "the City has stood its ground, kept the language intact, and fought this lawsuit for years." *Hill* v. *City of Houston*, 789 F.2d at 1109 (J.S. at A-14). Particularly in view of the profoundly important circumstance that Hill's attack on the Ordinance arises from a § 1983 claim for anticipatory declaratory and injunctive relief, rather than from an attempt to set aside an otherwise valid criminal conviction through the invocation of *jus tertii* standing,[69] there is simply no reason why the Court should relieve the City from the consequences of a five-year federal confrontation entirely of its own making.

If the City were successful in its last-gasp suggestion that the federal courts should abstain in Hill's case, it would be necessary to make an addition to the familiar categories of *Pullman* abstention,[70] *Burford* abstention,[71] and *Younger* abstention.[72] Courts and commentators would then be compelled to analyze "imminent defeat" abstention.

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[69] Hill's entitlement in a § 1983 action to challenge the Ordinance's prospective application to him is not dependent upon whether the words he spoke to Officer Kelley were constitutionally protected. A party who confronts a "credible threat" of future criminal prosecution under an unconstitutional state law, and who has standing to sue, may seek to invalidate it prospectively regardless of whether it has been validly applied (or even applied at all) to his past activities. *Steffel* v. *Thompson*, 415 U.S. 452, 475 (1974); *Dombrowski* v. *Pfister*, 380 U.S. 479, 489 (1965); *Baggett* v. *Bullitt*, 377 U.S. 360, 373-74 (1964).

Such a case is materially different from one in which a convicted defendant whose misconduct would have been clearly condemnable under a more narrowly drawn criminal statute seeks the aid of a federal court in setting aside an otherwise valid judgment of a state court because, as applied to others, the statute is unconstitutional. *Coates* v. *City of Cincinnati*, 402 U.S. at 617 (dissenting opinion of Justice White). "The injury of which [Hill] complains is one to him . . . [H]e is not seeking to raise the hypothetical rights of others." *Bigelow* v. *Virginia*, 421 U.S. 809, 817 (1975).

[70] *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496 (1941).

[71] *Burford* v. *Sun Oil Company*, 319 U.S. 315 (1943).

[72] *Younger* v. *Harris*, 401 U.S. 37 (1971) and companion cases.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit in this case should be affirmed on the grounds that the Ordinance is unconstitutional on its face, for both substantial vagueness and substantial overbreadth, in violation of the first and fourteenth amendments to the Constitution of the United States.

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APPENDIX

APPENDIX A

Art. 100, Revised Code of Ordinances, City of Houston, Texas (1886); Art. 102, Revised Code of Ordinances, City of Houston, Texas (1893); Art. 307, Revised Code of Ordinances, City of Houston, Texas (1897); Art. 628, Revised Code of Ordinances, City of Houston, Texas (1904); Sec. 829, Revised Code of Ordinances, City of Houston, Texas (1914); Sec. 1627, Revised Code of Ordinances, City of Houston, Texas (1922):

> **Resisting or Interfering with an Officer in the Discharge of His Duty.**—Any person who assaults, strikes, or in any manner opposes, molests, abuses or interrupts any officer of the city, or any policeman, in the execution of his duty, must be fined not less than one nor more than one hundred dollars.

Sec. 1725, Code of the City of Houston, Texas (1942):

> **Sec. 1725. Resisting or interfering with officer, etc.** Any person who assaults, strikes or in any manner opposes, molests, abuses or interrupts any officer of the city, or any policeman, in the execution of his duty, or any person summoned to aid in making an arrest, shall be fined not less than twenty-five nor more than five hundred dollars.

Sec. 32-3, Code of Ordinances, City of Houston, Texas (1958):

> **Sec. 32-3. Same—Assaulting or interfering with policemen.**
>
> It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any officer of the city, or any policeman, in the execution of his duty, or any person summoned to aid in making an arrest.

Sec. 34-11(a), Code of Ordinances, City of Houston, Texas (1968), as saved from repeal by Ord. No. 85-1380 (August 21, 1985):

> **Sec. 34-11. Assaulting or interfering with policemen.**
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

APPENDIX B

1. Ark. Stat. Ann. § 41-2802 (1977 Repl.) ("knowingly obstructs, impairs, or hinders")
2. Cal. Penal Code § 148 (1987 Supp.) ("willfully resists, delays, or obstructs")
3. Fla. Stat. Ann. § 843.02 (1986 Supp.) ("obstruct or oppose")
4. Ga. Code Ann. § 16-10-24(a) (1986 Supp.) ("knowingly and willfully obstructs or hinders")
5. Idaho Code § 18-705 (1986 Supp.) ("willfully resists, delays or obstructs")
6. Ill. Ann. Stat. 38: § 31-1 (1977) ("knowingly resists or obstructs")
7. Kan. Stat. Ann. § 21-3808 (1981) ("knowingly and willfully obstructing, resisting or opposing")
8. La. Rev. Stat. Ann. 14: § 108 (1986) ("intentional opposition or resistance to or obstruction of")
9. Mich. Comp. Laws Ann. § 750.479 (1968) ("knowingly and wilfully obstruct, resist or oppose")
10. Minn. Stat. Ann. § 609.50 (1987 Supp.) ("intentionally obstructs, hinders or prevents . . ." for the purpose of "interfering")
11. Mont. Code Ann § 45-7-302 (1985) ("knowingly obstructs, impairs, or hinders")
12. Nev. Rev. Stat. § 199.280 (1985) ("willfully resists, delays or obstructs")
13. N.M. Stat. Ann. § 30-22-1 (1984 Repl.) ("knowingly obstructing, resisting or opposing")
14. N.C. Gen. Stat. § 14-223 (1986 Supp.) ("willfully and unlawfully resist, delay or obstruct")

15. Ohio Rev. Code Ann. § 2921.31 (1982) ("hampers or impedes" with intent to "prevent, obstruct, or delay")
16. R.I. Gen. Laws § 11-32-1 (1981) ("obstruct")
17. S.C. Code Ann. § 16-9-320 (1985) ("opposes or resists")
18. Tenn. Code Ann. § 39-5-502 (1982) ("knowingly and willfully opposes or resists")
19. Vt. Stat. Ann. T. 13, § 903 (1986 Supp.) ("willfully and knowingly obstructs or in any manner hinders")
20. Wash. Rev. Code Ann. § 9A.76.020 (1977) ("knowingly hinder, delay, or obstruct")
21. Wis. Stat. Ann. § 946.41 (1982) ("knowingly resists or obstructs")

APPENDIX C

Rule 214. Review of Certified State Criminal Law Questions.

(a) Certification of Questions of Law. The Court of Criminal Appeals may answer questions of state criminal law certified to it by the Supreme Court of the United States or a United States Court of Appeals when requested by the certifying court, if there are involved in any proceedings before the certifying court questions of criminal law of this state which may be determinative of the cause then pending and as to which it appears to the certifying court that there is no controlling precedent in the decisions of the Court of Criminal Appeals. The Court of Criminal Appeals may, in its discretion, decline to answer the questions certified to it.

(b) Courts Who May Certify. This Rule may be invoked by an order of any of the courts named in section (a).

(c) Contents of the Certification Order. A certification order shall set forth:

(1) The questions of law to be answered;

(2) A stipulated statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose;

(3) The names of each party to the pending cause; and

(4) The names and addresses of counsel for each party.

(d) Preparation of the Certification Order. The certification order shall be prepared by the certifying court and forwarded to the Court of Criminal Appeals by the clerk of the certifying court under its official seal. The Court of Criminal Appeals may require the original or copies of all or any portion of the record before the certifying court to be filed under the certification order, if in the opinion of the Court of Criminal Appeals the record or portion thereof may be necessary in answering the questions.

(e) Briefs and Oral Argument. Upon agreement of the Court of Criminal Appeals to answer the questions certified to it, notice shall be given to all parties. The appealing party in the certifying court shall file his brief with the Clerk of the Court of Criminal Appeals within 30 days from the date the notice is mailed and the opposing parties shall file an answering brief within 15 days from the date the opening brief is received. Briefs shall be in the manner and form of Rule 74, Texas Rules of Appellate Procedure, so far as reasonably applicable. Oral argument may be granted upon application or ordered by this Court. If granted or ordered, argument shall be as provided in Rule 75, Texas Rules of Appellate Procedure.

(f) Notice to the Attorney General. When the constitutionality of a Texas penal statute is drawn in issue by certified question in a cause to which the State of Texas or an officer, agency or employee of the state is not a party, the Clerk of the Court of Criminal Appeals shall notify the Attorney General and shall permit the State of Texas to intervene for presentation of briefs and oral argument on the question of constitutionality.

(g) The Answer to the Certified Question. After all motions for rehearing have been overruled, the written opinion of the Court of Criminal Appeals stating the law governing the questions certified shall be sent by the clerk under the seal of the Court of Criminal Appeals to the certifying court and to the parties.

REPLY BRIEF

Supreme Court, U.S.
FILED
MAR 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR THE APPELLANT

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March 1987

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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NO. 86-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR THE APPELLANT

ARGUMENT

I.

The Houston ordinance is not unconstitutionally void on its face for vagueness, as the ordinance provides sufficient notice of the actions prohibited by its terms and does not operate as a prior restraint on the exercise of free speech by allowing standardless discretion in its enforcement.

Appellee Hill continues to argue that the ordinance is unconstitutionally vague, despite the fact that the Court of Appeals declined so to hold. A statute or an ordinance may be held to be vague on one of two grounds: First, in that it fails to notify an individual that conduct is prohibited or, second, because it allows standardless discretion to be exercised by local law enforcement officials. The Houston ordinance is constitutional under both tests.

It can be hardly be said that Section 34-11(a) fails to notify individuals, especially Raymond Wayne Hill, of prohibited conduct. Hill has been arrested and prosecuted under this ordinance four times. Vagueness is "not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). Moreover, this Court on two occasions has denied *jus tertii* standing to litigate vagueness to an individual whose conduct comes within the prohibitions of an ordinance.[1]

In his brief, Hill relies almost exclusively upon what he has characterized as "standardless discretion" in order to persuade this Court that the ordinance is unconstitutionally vague. While the cases that Hill cites (Appellee's Br., p. 24 nn. 35-42) do stand for the proposition that a statute or an ordinance that conditions

1. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982); *Parker v. Levy*, 417 U.S. 733 (1974).

the exercise of one's First Amendment rights upon the unfettered discretion of local officials is unconstitutional, none of them involves the type of ordinance at issue here. The overwhelming majority of the cited cases contain an element of censorship lacking in the Houston ordinance. Additionally, the majority of the ordinances or statutes at issue in these cases required local permission to use traditional public fora to express their often unpopular views.[2] As a general rule, the challenged ordinances contained no standards to guide the exercise of the discretion that was to be exercised in issuing the permit.

The Houston ordinance stands in stark contrast to those statutes. It is content-neutral and does not operate as a prior restraint on free expression. Section 34-11 (a) is, admittedly, a member of that class of ordinances which, by their terms, encompass a great variety of prohibited conduct. However, as the Court noted in *Smith v. Goguen*, 415 U.S. 566, 581 (1974):

> There are areas of human conduct where, by the nature of the problems presented, legislatures simply cannot establish standards with great precision. Control of the broad range of disorderly conduct that may inhibit a policeman in the performance of his official duties may be one such area requiring as it does an on-the-spot assessment of the need to keep order.

Any discretion in the administration of the ordinance exists, not in the granting of a permit, but

2. *See, e.g., Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969).

in the enforcement of the terms of the ordinance itself. Similar to disorderly conduct statutes and breach of the peace statutes, the ordinance indeed does rely upon the discretion of the individual officer in its enforcement. However, these types of statutes historically have not been invalidated as being void for vagueness merely because their enforcement involves the subjective judgment of local law enforcement officers.[3] Instead, they have been stricken only when used as an implement to suppress certain types of unpopular speech.[4]

Moreover, Raymond Hill is in error in asserting (Appellee's Br., pp. 20-22) that Houston is alone among the jurisdictions that have adopted laws similar to Section 34-11(a). Hill is simply wrong in stating that "apparently there are none" (*id.* p. 21) and that "Houston seems to be the only one of approximately 1,145 incorporated municipalities in Texas that has implemented an 'interrupting' ordinance" (*id.*).

In fact, federal law, state laws, and city ordinances in Texas and many other states are replete with similar provisions seeking to protect law enforcement officials from undue interference—physical and otherwise. Set forth in the Appendix are examples, consisting of the United States Code; statutes from 47 states and the District of Columbia; a sampling of ordinances from 29

3. Hill has apparently confused lack of certainty as to the outcome of different prosecutions under the ordinance with vagueness as to what the law prohibits. *See Winters v. New York*, 333 U.S. 507, 535 (1974) (Frankfurter, J., dissenting). "Diversity in result for similar conduct in different trials under the same statute, is an unavoidable feature of criminal justice." *Id.*

4. *See*, e.g., *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

municipalities in 23 states other than Texas; and ordinances from 23 Texas municipalities.

Ray Hill most certainly would have been arrested under many of these laws. The existence of laws prohibiting interference with an arrest in diverse localities underscores the need for such proscriptions in order to promote the legitimate peacekeeping function. If this Court declares the Houston ordinance unconstitutional, these laws also will be subject to constitutional attack.[5]

Finally, Hill's characterization of the ordinance as a "dragnet" ordinance is erroneous. The concept of a "dragnet" ordinance stems from this Court's decision in *United States v. Reese*, 92 U.S. 214, 221 (1875):

> It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

5. Such a result not only would inordinately hamper lawful investigations and arrests, but also would allow potentially volatile situations to get out of hand, resulting in possible physical harm to police officers and others. *Lewis v. New Orleans*, 415 U.S. 130 (1974), graphically illustrates the potential for a verbal confrontation to escalate to a physical altercation between an individual and an officer. A 1986 FBI study recalls that a total of 61,724 officers (approximately 1 out of 6) were victims of assault in 1985. In 1981-85, 413 law enforcement officials were killed, and some 300,000 assaulted. Significantly, in 1985 almost 5,000 were assaulted *during an investigation*. *See* FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 1985, at 18, 45-54 (1986). Surely the Constitution permits municipalities to prevent such a result.

Dragnet ordinances, therefore, are ordinances that allow the arrest of individuals upon mere suspicion, and without probable cause, as distinguished from ordinances that actually criminalize conduct rather than status. Examples of laws that have been properly characterized as dragnet laws are vagrancy laws[6] and stop-and-identify laws.[7] Suspicion, rather than actual criminal activity, is their hallmark.

The Houston ordinance is obviously not a "dragnet" law. It allows an arrest only for prohibited conduct; it does not countenance an arrest based upon the mere suspicion of a law enforcement officer. The ordinance is no more a dragnet law than any other ordinance that criminalizes a number of different types of activities and relies upon the exercise of judgment by local police officers for its enforcement.

II.

The potential exists in the Texas courts, both civil and criminal, for a narrowing construction of the ordinance, and the ordinance is readily susceptible to such a limiting construction.

Hill vigorously contends that any potential narrowing construction by state law is so unlikely as to be remote. In this regard he advances four arguments. First, he argues that a narrowing construction cannot cure the standardless discretion that he claims is inherent in the ordinance. Second, he contends that Texas civil courts lack jurisdiction to construe penal statutes. Third, Hill suggests that the criminal appellate system in Texas is so

6. E.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

7. E.g., *Kolender v. Lawson*, 461 U.S. 352 (1983).

structured as to make it impossible for a criminal court ever to have an opportunity to construe Section 34-11(a) authoritatively. Finally, Hill argues that the recently-adopted procedure for certification of questions from federal to state courts does not operate to aid in producing a narrowing construction.[8]

It is true that Texas civil courts have generally refrained from enjoining the enforcement of criminal laws unless the laws are unconstitutional and amount to an invasion of, and cause irreparable injury to, a vested property right. However, the cases decided by the Texas courts in this area primarily involve attacks upon local *economic* regulations restricting the commercial use of streets.[9]

8. Hill also refers to the majority opinion below for the proposition that "[t]he real penalty is a trip to the city jail in the back of a squad car and having to post bond even if one later protests the charge and is found innocent" (Appellee's Br., p. 34 n.57). Of course, if this is the "real penalty," then an administrative policy that limited custodial arrests to those situations in which the individual is likely to cause harm to himself or others or is likely to fail to appear for trial would in and of itself be a sufficient "narrowing construction."

9. *See*, e.g., *State v. Logue*, 373 S.W.2d 567 (Tex. 1964) (civil court had no jurisdiction to issue injunction restraining enforcement of penal statute requiring a permit for the operation of a truck used for transporting material for hire because no vested right to use public streets to conduct a business); *Chevron Oil Co. v. City of El Paso*, 537 S.W.2d 472 (Tex. Civ. App.—El Paso 1976, no writ) (civil court had no jurisdiction to issue declaratory judgment or injunction restraining enforcement of penal ordinance regulating routes and methods used in transporting flammable liquid because no vested right to use public streets to conduct a business); *City of Amarillo v. Griggs Southwest Mortuary, Inc.*, 406 S.W.2d 230 (Tex. Civ. App.—Amarillo 1966, writ ref'd n.r.e.) (civil court has no jurisdiction to issue declaratory judgment or injunction restraining enforcement of penal ordinance regulating ambulance service because no vested right to use streets to conduct a business, and defense of criminal prosecution is an adequate remedy).

Despite the existence of this doctrine, recent Texas cases suggest a relaxation of the rule in the First Amendment area where an ordinance has not previously been declared to be constitutional.[10] Moreover, in *Houston Chronicle Publishing Co. v. City of Houston*, 620 S.W.2d 833 (Tex. Civ. App.—Houston [14th Dist.], no writ), the court reversed a lower court judgment upholding a penal ordinance banning the sale of newspapers to occupants of motor vehicles, declared the ordinance unconstitutional, and ordered an injunction against its further enforcement. Obviously, the rule exists, but so do exceptions to that rule. It is disingenuous for Hill to argue that this jurisdiction does not exist when he has never attempted to file a declaratory judgment action or an action for injunction in state court.

Hill's next two contentions as to the remoteness of a narrowing construction are more speculation than argument. Hill attempts to make the Texas criminal appellate process seem attenuated by the mere artifice of separating the appellate steps into their component parts. However, Hill has not shown that the Texas criminal appellate system has ever been judicially determined to deny anyone adequate due process. In fact, Hill points out (Appellee's Br., pp. 21-22 & n.31) that a number of statutes similar to the Houston ordinance have been authoritatively construed *and narrowed* by the respective state courts when those courts have been given the opportunity to decide their constitutionality.[11] Inexplicably,

10. *Cf. Iranian Muslim Organization v. City of San Antonio*, 615 S.W.2d 202 (Tex. 1981).

11. *See*, e.g., *City of Englewood v. Hammes*, 671 P.2d 947 (Colo. 1983).

Hill goes on to argue that the Texas courts should not be allowed this opportunity because the possibility is, in his view, remote.

Similarly unpersuasive is Hill's argument that the certification process contained in Rule 214, Tex. R. App. P., is ineffective because the state court might decline to answer the question. The real issue is whether a narrowing construction is available in order that a federal court may avoid unnecessarily deciding the constitutionality of a state statute or local ordinance. This possibility is dramatically illustrated by Hill's repeated contention that Section 34-11(a) regulates *only* speech because the Texas Penal Code has already criminalized conduct. A state court is the forum that properly should test that contention in order possibly to avoid the federal constitutional question.[12]

III.

The fact that the Texas Penal Code criminalizes assault on a police officer and contains other provisions that prohibit, in a particular context, conduct that might occur while police officers are performing their duties does not make the Houston ordinance applicable only to speech.

Ray Hill does not take issue with the City's formulation of the overbreadth doctrine as stated in *Brodrick v. Okla-*

12. Hill's argument that the City's claim of abstention was untimely and thus waived misses the mark. Abstention is a matter of comity and can be raised *sua sponte* if needed to avoid an unnecessary interpretation of state or local law. This consideration becomes especially important where, as here, an ordinance attempts to promote the municipality's strong interest in the preservation of the public safety and order by criminalizing conduct that interrupts or interferes with a peace officer.

homa, 413 U.S. 601 (1973) (*see* Appellant's Br., pp. 8-20). Rather, Hill insists that the application of certain provisions of the Texas Penal Code preempts the enforcement of Section 34-11(a) to such a degree that the ordinance no longer regulates core criminal conduct, but in fact is an ordinance that regulates no conduct and therefore "has no core."

Section 1.08 of the Texas Penal Code provides that a Texas municipality may not make any conduct covered by that Code an offense subject to a criminal penalty. Therefore, in order to determine whether Section 34-11(a) violates the Penal Code, the various elements of the ordinance must be examined within the context of the Code.

The City recognizes that any species of physical assault on a police officer is encompassed within the provisions of the Texas Penal Code.[13] However, by Hill's own admission, the particular portion of the ordinance that prohibits assaulting or striking an officer is not being challenged in this litigation. Moreover, Section 1.08 of the Texas Penal Code does not prevent a municipality from criminalizing conduct that stops short of actually causing bodily injury and thus constituting an assault.[14] In fact, Hill tacitly recognizes the City's authority to legislate in this area by directing his constitutional attack at the language "oppose, molest, abuse or interrupt." Therefore, the issue before this Court centers upon the City's ability to punish conduct that interferes with a police officer's performance

13. Tex. Penal Code §§ 22.01, 22.02 and 22.03.

14. The statutes and ordinances set forth in the Appendix similarly contain words that fall short of physical assault, such as "impede," "oppose," "intimidate," "interfere," "obstruct," "delay," "impair," and "hinder."

of his duty while falling short of constituting an actual assault on the officer.[15]

In this regard, Hill urges that the only conduct left to regulate is pure speech.[16] To buttress this argument, Hill

15. Inappropriately, Hill has gone outside the record in asking the Court to take judicial notice of a document entitled "Request for Council Action" (Appellee's Br., pp. 12-13 & n. 17). Pursuant to Fed. R. Evid. 201(e), the City objects to the use of this document as improper under Fed. R. Evid. 201(b). It certainly does not refer to facts that are "generally known," for Hill's counsel admits that he did not learn of the matter until October 28, 1986 (Appellee's Br., p. 13 n. 18). Moreover, without full testimony and cross-examination regarding the circumstances underlying the document, as would have occurred at trial, no inference should be drawn from it. Certainly, the matters referred to therein are not, without a full hearing, "capable of accurate and ready determination" as required by the rule.

Even if the document is to be "admitted" without predicate, it is irrelevant to this case. The "Request for Council Action" is nothing more than a communication recommending that City Council take a particular action. Here, the Legal Department, after four years' work, was submitting to Council the first comprehensive re-compilation of the Houston Code of Ordinances since 1968. After that revision was begun in 1981, Ray Hill challenged Section 34-11(a) in federal district court, and the recommended action was reconsidered. The City Council's action in saving the ordinance from repeal maximizes its legislative options by awaiting a final determination before deciding whether to retain, amend, or delete Section 34-11(a). This process does not support an inference that Section 34-11(a) is not needed to prevent interrupting or interfering with police officers in the performance of their duties. Moreover, Mr. Hill should not be critical that, in light of his victory before the Court of Appeals panel, the City chose to delay the printing of the challenged ordinance in the bound volumes of its new codification until a final decision had been rendered.

16. The record indicates that two of the most common varieties of charges under the ordinance are "arguing with officer" and "refusing to leave" (R. I: 151). However, the charges that the officer uses to complete the complaint form are not necessarily totally descriptive of the incident that precipitated the arrest. As Hill has conceded, the ordinance covers a "diverse range of verbal and non-verbal" interruptions (Appellee's Br., p. 15).

cites a number of provisions of the Texas Penal Code, most of which have no application to the conduct criminalized by the ordinance (Appellee's Br., p. 19 n. 27). Moreover, Hill's argument that Section 42.01 of the Texas Penal Code governing disorderly conduct preempts the City ordinance is unusal. That Penal Code provision could apply to a myriad of situations. However, Section 34-11(a) applies to a particular situation—interrupting a police officer in the execution of his duty. Thus, Hill is placed in the anomalous situation of being forced to argue the unconstitutionality of a *narrowly drawn* law (i.e., the Houston ordinance) as a restriction on free speech because of the existence of a much *broader* law.

As the City has previously pointed out (Appellant's Br., pp. 8-12), Section 34-11(a) is a core criminal conduct law which, while it may have an incidental effect on speech, still primarily prohibits *core conduct that may be criminalized*.[17] Hill's repeated attempts to mischaracterize the nature of the ordinance are exemplified by his misplaced reliance upon the unconstitutionality of statutes or ordinances such as those involved in *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Lewis v. City of New Orleans*, 415 U.S. 130 (1974). In each of these cases, the statute at

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There are a myriad of circumstances that could occasion an arrest under the ordinance that to some degree could involve "speech." For example, an individual could drive an automobile into the middle of the site of a criminal investigation as a protest against what is perceived to be unfair treatment or a pattern of police brutality. In like manner, an individual might scream in an officer's face in order to distract that officer from completing an investigation.

17. An individual cannot engage in an apparently limitless variety of conduct, and label it "speech" merely because, as a part of that conduct, the individual wishes to express an idea. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

issue *expressly* prohibited verbal expression.[18] By contrast, the Houston ordinance does not expressly prohibit speech.

The Houston ordinance is similar to the criminal trespass statute enforced against the demonstrators at the jail in *Adderly v. Florida*, 385 U.S. 39 (1967), where the use of the jailhouse grounds was found to be inappropriate as a place for protest. Similarly, the site of a criminal investigation is also an inapt forum for protest. While the use of the words "oppose, molest, abuse or interrupt" can concededly include speech, the words do not expressly govern speech. The type of activities that are most often covered by these words are graphically illustrated by the testimony given in the trial court: The individuals who testified that they were arrested under the ordinance all were engaged in conduct rather than pure speech.[19] Certainly, Mr. Hill's actions constituted more than just free speech, and were a deliberate attempt to

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18. *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) ("obscene or opprobrious language"); *Gooding v. Wilson*, 405 U.S. 518 (1972) ("opprobrious words or abusive language"). *See also Plummer v. City of Columbus*, 414 U.S. 2 (1973); ("menacing, insulting, slanderous or profane language"); *Brown v. Oklahoma*, 408 U.S. 914 (1972) ("any obscene or lascivious language or word"); *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) ("loud and offensive or profane or indecent language").

19. In the instances testified to at trial, the arrestees admittedly were warned by the police that they should desist from interrupting (or interfering with) ongoing police matters prior to actually being arrested (R. I: 11, 23, 35 (Long); R. I: 107; (Wong); R. I: 125 (Feutrail)). These are not instances where someone unwittingly stumbled upon an investigation (R. II: 11-18 (Feutrail); R. II: 38-43 (Long); R. II: 44-45 (Wong); R. II: 94-98 (Benton); R. II: 64; R. III: 94-98)). Moreover, the facts surrounding these arrests show that the police were acting in a manner calculated to ensure either someone's personal safety or the preservation of evidence, or both (R. II: 20). The officers involved acted in a reasonably prudent fashion under the various circumstances.

interrupt a Houston police officer and to provoke that officer into an arrest of Mr. Hill rather than the individual being properly investigated.

CONCLUSION

The Constitution surely must be read to permit local governments to protect police officers from undue interference in the performance of their law enforcement duties. Such reasonable protection—as with the Houston ordinance—need not thwart the expression of ideas protected by the First Amendment. Where conduct such as Mr. Hill's actually threatens or interrupts a legitimate governmental function, America's cities have a right to protect themselves and their citizens. That issue is now squarely before this Court.

Respectfully submitted,

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March 1987

FEDERAL STATUTE

18 U.S.C. § 111 (1969).

§ 111. Assaulting, resisting, or impeding certain officers or employees. Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with [certain federal officers] while engaged in or on account of the performance of [their] official duties, shall be fined not more than $5,000 or imprisoned not more than three years or both. . . .

APPENDIX

STATE STATUTES

Ala. Code § 13A-10-41 (1975).

§ 13A-10-41. Resisting arrest.

(a) A person commits the crime of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from effecting a lawful arrest of himself or of another person.

(b) Resisting arrest is a Class B misdemeanor.

Alaska Stat. § 11.56.700 (1983).

Sec. 11.56.700. Resisting or interfering with arrest.

(a) A person commits the crime of resisting or interfering with arrest if, knowing that a peace officer is making an arrest, with the intent of preventing the officer from making the arrest, the person resists personal arrest or interferes with the arrest of another by

(1) force;

(2) committing any degree of criminal mischief; or

(3) any means that creates a substantial risk of physical injury to any person.

(b) Resisting or interfering with arrest is a class A misdemeanor.

Ariz. Rev. Stat. Ann. § 13-2508 (Supp. 1986).

§ 13-2508. Resisting arrest; classification

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:

1. Using or threatening to use physical force against the peace officer or another; or

2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

B. Resisting arrest is a class 6 felony.

Ark. Stat. Ann. § 41-2802 (1977).

§ 41-2802. Obstructing governmental operations. —(1) A person commits the offense of obstructing governmental operations if he knowingly obstructs, impairs, or hinders the performance of any governmental function.

(2) Obstructing governmental operations by using or threatening to use physical force is a class A misdemeanor. Otherwise obstructing governmental operations is a class C misdemeanor.

(3) This section shall not apply to:

(a) unlawful flight by a person charged with an offense; or

(b) refusal to submit to arrest; or

(c) any means of avoiding compliance with the law not involving affirmative interference with governmental functions; or

(d) the obstruction, impairment or hinderance of unlawful action by a public servant.

Cal. Penal Code § 148 (Deering 1985).

§ 148. [Resisting public officer in discharge of duties]

Every person who willfully resists, delays, or obstructs any public officer or peace officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

Colo. Rev. Stat. § 18-8-104 (1986).

§ 18-8-104. Obstructing a peace officer or fireman. (1) A person commits obstructing a peace officer or fireman when, by using or threatening to use violence, force, or physical interference, or obstacle, he knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his official authority, or knowingly obstructs, impairs, or hinders the prevention, control, or abatement of fire by a fireman, acting under color of his official authority.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal

manner, if he was acting under color of his official authority as defined in section 18-8-103(2).

(3) Repealed. L. 83, p. 671, § 23, effective July 1, 1983.

(4) Obstructing a peace officer or fireman is a class 2 misdemeanor.

Conn. Gen. Stat. Ann. § 53a-167a (West 1985).

§ 53a-167a. Interfering with an officer; Class A misdemeanor.

(a) A person is guilty of interfering with an officer when he obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties.

(b) Interfering with an officer is a class A misdemeanor.

Del. Code Ann. tit. 11 § 1257 (1979).

§ 1257. Resisting arrest; class A misdemeanor.

A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of himself or another person or intentionally flees from a peace officer who is effecting an arrest.

District of Columbia Code § 22-505 (1981).

§ 22-505. Assault on member of police force or fire department.

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimi-

dates, or interferes with any officer or member of any police force operating in the District of Columbia, or any officer or member of any fire department operating in the District of Columbia; or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than 5 years or both. It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such arrest is made by an individual he has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

(b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than 10 years.

Fla. Stat. Ann. § 843.02 (West Supp. 1986).

843.02. Resisting officer without violence to his person.

Whoever shall obstruct or oppose any such officer, beverage enforcement agent, weight and safety officer of the Department of Transportation, member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, parole and probation supervisor or

parole and probation officer employed by the Department of Corrections, personnel or representative of the Department of Law Enforcement, or legally authorized person in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Ga. Code Ann. 16-10-24 (Supp. 1986).

16-10-24. Obstruction or hindering of law enforcement officers.

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.

(b) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, correctional officer, probation supervisor, parole supervisor, or conservation ranger in the lawful discharge of his official duties by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

Hawaii Rev. Stat. § 710-1026 (1976).

§ 710-1026 Resisting arrest. (1) A person commits the offense of resisting arrest if he intentionally pre-

vents a peace officer acting under color of his official authority from effecting an arrest by:

(a) Using or threatening to use physical force against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing bodily injury to the peace officer or another.

(2) Resisting arrest is a misdemeanor.

Idaho Code § 18-705 (1979).

18.705. Resisting and obstructing officers.—Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding $5,000, and imprisonment in the county jail not exceeding one (1) year.

Ill. Ann. Stat. Ch. 38, § 31-1 (Smith-Hurd 1977).

§ 31-1. Resisting or Obstructing a Peace Officer

A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity commits a Class A misdemeanor.

Ind. Code Ann. § 35-44-3-3 (West Supp. 1986).

35-44-3-3 Resisting law enforcement

Sec. 3. (a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the

officer while the officer is lawfully engaged in the execution of his duties as an officer;

(2) forcibly resists, obstructs, or interferes with the authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor. However, the offense is a Class D felony if, while committing it, the person draws or uses a deadly weapon, inflicts bodily injury on another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person.

(b) For purposes of this section, a law enforcement officer includes an alcoholic beverage enforcement officer and a conservation officer of the department of natural resources.

Iowa Code Ann. § 719.1 (West Supp. 1986).

719.1. Interference with official acts

A person who knowingly resists or obstructs anyone known by the person to be a peace officer or fire fighter, whether paid or volunteer, in the performance of any act which is within the scope of the lawful duty or authority of that officer or fire fighter, whether paid or volunteer, or who knowingly resists or obstructs the service or execution by any authorized person of any civil or criminal process or order of any court, commits a simple misdemeanor. However, if a person commits an interference with official acts,

as defined in this section, and in so doing inflicts bodily injury other than serious injury, that person commits a serious misdemeanor. If a person commits an interference with official acts, as defined in this section, and in so doing inflicts or attempts to inflict serious injury, or displays a dangerous weapon, as defined in section 702.7, or is armed with a firearm, that person commits an aggravated misdemeanor. The terms "resist" and "obstruct", as used in this section, do not include verbal harassment unless the verbal harassment is accompanied by a present ability and apparent intention to execute a verbal threat physically.

Kan. Stat. Ann. § 21-3808 (1981).

21-3808. Obstructing legal process or official duty. Obstructing legal process or official duty is knowingly and willfully obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty.

Obstructing legal process or official duty in a case of felony is a class E felony. Obstructing legal process or official duty in a case of misdemeanor or a civil case is a class A misdemeanor.

Ky. Rev. Stat. Ann. § 520.090 (Baldwin 1984).

520.090 Resisting arrest

(1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his

official authority, from effecting an arrest of the actor or another by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

(2) Resisting arrest is a Class A misdemeanor.

La. Rev. Stat. Ann. § 14:108 (West 1986).

§ 108. Resisting an officer

A. Resisting an officer is the intentional opposition or resistance to or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property or to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

B. (1) The phrase "obstruction of" as used herein shall, in addition to its common meaning, signification, and connotation mean the following:

(a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(b) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

(c) Refusal by the arrested party to give his name and make his identity known to the arresting officer.

(d) Congregation with others on a public street and refusal to move on when ordered by the officer.

(2) The word "officer" as used herein shall include deputy sheriffs and municipal police officers.

C. Whoever commits the crime of resisting an officer shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

Me. Rev. Stat. Ann. tit. 17-A, § 751 (1983).

§ 751. Obstructing government administration

1. A person is guilty of obstructing government administration if he uses force, violence, intimidation or engages in any criminal act with the intent to interfere with a public servant performing or purporting to perform an official function.

2. This section shall not apply to:

A. Refusal by a person to submit to an arrest;

B. Escape by a person from official custody, as defined in section 755.

3. Obstructing government administration is a Class D crime.

Mich. Comp. Laws Ann. § 750.479 (West 1968).

SEC. 479. Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff,

coroner, township treasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of an ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two [2] years, or by a fine of not more than one thousand [1,000] dollars.

Minn. Stat. Ann. § 609.50 (West 1964).

609.50 Obstructing legal process or arrest

Whoever intentionally obstructs, hinders or prevents the lawful execution of any legal process, civil or criminal, or apprehension of another on a charge or conviction of a criminal offense may be sentenced as follows:

(1) If the act was accompanied by force or violence or the threat thereof, to imprisonment for not more than one year or to payment of a fine of not more than $1,000, or both; or

(2) In other cases to imprisonment for not more than 90 days or to payment of a fine of not more than $100.

Miss. Code Ann. § 97-9-73 (1972).

§ 97-9-73. Resisting or obstructing arrest

It shall be unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest or the lawful arrest of another person by any sheriff or deputy sheriff of any county, or any municipal policeman, or any constable, or by any other law enforcement officer of the State of Mississippi, or of any county or municipality thereof, and any person or persons so doing shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six months, or both.

Mo. Ann. Stat. § 575.150 (Vernon 1979).

575.150. Resisting or interfering with arrest

1. A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, for the purpose of preventing the officer from effecting the arrest, he:

(1) Resists the arrest of himself by using or threatening the use of violence or physical force or by fleeing from such officer; or

(2) Interferes with the arrest of another person by using or threatening the use of violence, physical force or physical interference.

2. This section applies to arrests with or without warrants and to arrests for any crime or ordinance violation.

3. It is no defense to a prosecution under subsection 1 of this section that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

4. Resisting, by means other than flight, or interfering with an arrest for a felony is a class D felony; otherwise, resisting or interfering with arrest is a class A misdemeanor.

Mont. Code Ann. § 45-7-302 (1985).

45-7-302. Obstructing a peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if he knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Neb. Rev. Stat. § 28-906 (1985).

28-906. Obstructing a peace officer; penalty. (1) A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he intentionally obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer or judge acting under color of his official authority.

(2) Obstructing a peace officer is a Class I misdemeanor.

Nev. Rev. Stat. § 199.280 (1985).

199.280. Resisting public officer.

Every person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:

1. Where a dangerous weapon is used in the course of such resistance, obstruction or delay, by imprisonment in the state prison for not less than 1 year nor more than 6 years, and may be further punished by a fine of not more than $5,000.

2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

N.H. Rev. Stat. Ann. § 642:1 (1986).

642:1 Obstructing Government Administration. A person is guilty of a misdemeanor if he uses force, violence, intimidation or engages in any other unlawful act with a purpose to interfere with a public servant, as defined in RSA 640:2, II, performing or purporting to perform an official function; provided, however, that flight by a person charged with an offense, refusal by anyone to submit to arrest or any such interference in connection with a labor dispute with the government shall be prosecuted under the statutes governing such matters and not under this section.

N.J. Stat. Ann. § 2C:29-1 (West 1982).

2C:29-1. Obstructing administration of law or governmental function.

A person commits a disorderly persons offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act. This section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means

of avoiding compliance with law without affirmative interference with governmental functions.

N.M. Stat. Ann. § 30-22-1 (1984).

30-22-1. Resisting, evading or obstructing an officer.

Resisting, evading or obstructing an officer consists of:

A. Knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;

B. intentionally fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or evasion has knowledge that the officer is attempting to apprehend or arrest him;

C. willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whether by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle; or

D. resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties.

Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor.

N.Y. Penal Law § 195.05 (McKinney Supp. 1987).

§ 195.05 Obstructing governmental administration in the second degree

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service.

Obstructing governmental administration is a class A misdemeanor.

N.C. Gen. Stat. § 14-223 (1986).

§ 14-223. Resisting officers.

If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

N.D. Cent. Code § 12.1-08-01 (1985).

12.1-08-01. Physical obstruction of government function.

1. A person is guilty of a class A misdemeanor if he intentionally obstructs, impairs, impedes, hinders, prevents, or perverts the administration of law or other governmental function.

2. This section does not apply to the conduct of a person obstructing arrest of himself, but such conduct is subject to section 12.1-08-02. This section does apply to the conduct of a person obstructing arrest of another. Inapplicability under this subsection is a defense.

3. It is a defense to a prosecution under this section that the administration of law or other government function was not lawful, but it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful. For the purposes of this subsection, the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other process for arrest or search and seizure shall be deemed lawful.

Ohio Rev. Code Ann. § 2921.31 (Page 1982).

§ 2921.31 Obstructing official business.

(A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(B) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Okla. Stat. Ann. tit. 21, § 540 (West 1983).

§ 540. Obstructing officer

Every person who willfully delays or obstructs any public officer in the discharge or attempt to

discharge any duty of his office, is guilty of a misdemeanor.

Or. Rev. Stat. § 162.235 (1985).

162.235. Obstructing governmental or judicial administration. (1) A person commits the crime of obstructing governmental or judicial administration if the person intentionally obstructs, impairs or hinders the administration of law or other governmental or judicial function by means of intimidation, force, physical or economic interference or obstacle.

(2) This section shall not apply to the obstruction of unlawful governmental or judicial action or interference with the making of an arrest.

(3) Obstructing governmental or judicial administration is a Class A misdemeanor.

18 Pa. Cons. Stat. Ann. § 101 (Purdon 1983).

§ 5101. Obstructing administration of law or other governmental function

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

R.I. Gen. Laws § 11-32-1 (1981).

11-32-1. Obstructing officer in execution of duty. — Every person who shall obstruct any officer, civil, military, or otherwise, including any state, city or town police, sheriff or fireman, while in the execution of his office or duty, shall be imprisoned not exceeding one (1) year or be fined not exceeding five hundred dollars ($500).

S.D. Codified Laws Ann. § 22-11-6 (1979).

22-11-6. Obstructing law enforcement officer, jailer or firefighter as misdemeanor. Except as provided in §§ 22-11-4 and 22-11-5, any person who, by threatening to use violence, force or physical interference or obstacle, intentionally obstructs, impairs or hinders the enforcement of the criminal laws or the preservation of the peace by a law enforcement officer or jailer acting under color of his official authority, or intentionally obstructs, impairs or hinders the prevention, control or abatement of fire by a fire fighter acting under color of his official authority, is guilty of obstructing a law enforcement officer or jailer or firefighter. Obstructing a law enforcement officer, jailer or firefighter is a Class 1 misdemeanor.

Tenn. Code Ann. § 39-5-502 (1982).

39-5-502. Resisting officer serving process — Misdemeanor. — Any person who knowingly and willfully opposes or resists an officer of the state, or other authorized person, in serving, or attempting to serve or execute, any legal writ or process, shall be guilty of a misdemeanor.

Tex. Penal Code Ann. § 38.03 (Vernon 1974).

§ 38.03. Resisting Arrest or Search

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest or search of the actor or another by using force against the peace officer or another.

(b) It is no defense to prosecution under this section that the arrest or search was unlawful.

(c) Except as provided in Subsection (d) of this section, an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor uses a deadly weapon to resist the arrest or search.

Utah Code Ann. § 76-8-301 (1982).

76-8-301. Interference with public servant.—A person is guilty of a class B misdemeanor if he uses force, violence, intimidation, or engages in any other unlawful act with a purpose to interfere with a public servant performing or purporting to perform an official function.

Vt. Stat. Ann. tit. 13, § 3001 (1986).

§ 3001. Impeding public officers

A person who hinders an executive, judicial, law enforcement, civil or military officer acting under the authority of this state or any subdivision thereof

shall be imprisoned not more than three years or fined not more than $500.00, or both.

Va. Code § 18.2-460 (Supp. 1986).

§ 18.2-460. Obstructing justice by threats or force. —A. If any person, by threats, or force, knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law-enforcement officer, lawfully engaged in his duties as such, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a Class 1 misdemeanor.

B. If any person by threats of bodily harm or force knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law enforcement officer, lawfully engaged in the discharge of his duty, or to obstruct or impede the administration of justice in any court relating to a violation of or conspiracy to violate § 18.2-248 or § 18.2-248.1 (a)(3), (b) or (c) he shall be guilty of a Class 5 felony.

Wash. Rev. Code Ann. § 9A.76.020 (1977).

9A.76.020. Obstructing a public servant. Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required of him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor.

W. Va. Code § 61-5-17 (1984).

§ 61-5-17. Obstructing officer; penalty.

Any person who by threats, menaces, acts or otherwise, shall forcibly or illegally hinder, obstruct, or oppose, or attempt to obstruct or oppose, or shall counsel, advise or invite others to hinder, obstruct or oppose any officer in this State (whether civil or military) in the lawful exercise or discharge of his official duty, shall, for every such offense, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be imprisoned not exceeding one year.

Wis. Stat. Ann. § 946.41 (West 1982).

946.41 Restricting or obstructing officer

(1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.

(2) In this section:

(a) "Officer" means a peace officer or other public officer or public employee having the authority by virtue of his office or employment to take another into custody.

(b) "Obstructs" includes without limitation knowingly giving false information to the officer with intent to mislead him in the performance of his duty including the service of any summons or civil process.

(3) Whoever by, violating this section hinders, delays or prevents an officer from properly serving

or executing any summons or civil process, is civilly liable to the person injured for any actual loss caused thereby and to the officer or his superior for any damages adjudged against either of them by reason thereof.

Wyo. Stat. § 6-5-204 (1977).

§ 6-5-204. Interference with peace officer; penalties.

(a) A person commits a misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than one thousand dollars ($1,000.00), or both, if he knowingly obstructs, impedes or interferes with or resists arrest by a peace officer while engaged in the lawful performance of his official duties.

(b) A person who intentionally and knowingly causes or attempts to cause bodily injury to a peace officer engaged in the lawful performance of his official duties is guilty of a felony punishable by imprisonment for not more than ten (10) years.

ORDINANCES IN STATES OTHER THAN TEXAS

Akron, Ohio, Code of Ordinances § 136.11 (1985).

§ 136.11 Obstructing Official Business.

(a) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(b) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Albuquerque, N.M., Rev. Ordinances § 12-1-2-20 (1986).

§ 12-1-220 Resisting, Obstructing or Refusing to Obey an Officer.

Resisting, obstructing or refusing to obey an officer consists of either:

(a) Knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process; or

(b) Resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties; or

(c) Refusing to obey or comply with any lawful process or order given by any police officer acting in the lawful discharge of his duties; or

(d) Interfering with, obstructing or opposing any officer in the lawful discharge of his regular and affixed duties.

Annapolis, Md., Code § 18-8 (1984).

§ 18-8 Resisting or interfering with police officer.

No person shall resist or interfere with any police officer in the discharge of his duty.

Boulder, Colo., Rev. Code § 5-5-3(a) (1981).

§ 5-5-3 Obstructing a Peace Officer or Firefighter.

(a) No person shall, by using or threatening to use violence, force, or physical intereference or obstacle knowingly obstruct, impair, or hinder the enforcement of the law or the preservation of the peace by a peace officer, acting under color of official authority, or knowingly obstruct, impair, or hinder the prevention, control, or abatement of fire or other emergency action by a fire fighter, acting under color of official authority.

Chicago. Ill., Municipal Code § 11-33 (1982).

§ 11-33 Resisting Police Officer.

(a) Any person who knowingly shall resist or obstruct the performance by one known to the person to be a peace officer of any authorized act within his official capacity or shall knowingly interfere or prevent a peace officer from discharging his duty as such officer and whoever shall in any manner knowingly assist any person in the custody of any member of the police department to escape or attempt to

escape from such custody, shall be fined not less than $25.00 nor more than $500.00.

Columbia, S.C., Code of Ordinances § 2-1003 (1980).

§ 2-1003 Resisting or interfering with police.

(a) It shall be unlawful for any person after having been placed under arrest or taken into custody by the police or other persons authorized to do so, to resist arrest whether actively or by flight.

(b) It shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties.

Dayton, Ohio Code of Gen. Ordinances § 131.02 (1984).

§ 131.02 Obstructing Official Business.

(a) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(b) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Daytona Beach, Fla., Code § 35-7(a) (1971).

§ 35-7 Obstructing Firefighter and Police Officer and Official Police Dogs; Resisting Arrest or Physical Service of Process; Mistreatment of Dogs Prohibited.

(a) It shall be unlawful for any person knowingly to resist or obstruct the lawful performance by one who the person knows, or has reason to believe, is a police officer, official police dog, or firefighter in any authorized act, within such officer's or dog's official capacity.

Fairbanks, Alaska, Code of Ordinances § 6.602 (1984).

§ 6.602 Interfering with a Police Officer.

A person commits the offense of interfering with a police officer if:

(a) By use or threat of force or violence, he prevents or attempts to prevent a police officer from effecting an arrest of another person;

(b) By use of threat of force or violence he attempts to aid or aids a person in the custody of a police officer to escape; or

(c) With the intent to delay or prevent a police officer from discharging the officer's lawful duties, he in any manner physically impedes or hinders the police officer.

Jackson, Tenn., Charter and Official Code § 19-31 (1966).

§ 19-31 Resisting, interfering with Police Officer.

It shall be unlawful for any person to resist or in any way interfere with or hinder any police officer while the latter is in the discharge or apparent discharge of his duty.

Jackson, Wyo., Municipal Code § 9.04.050(a) (1973).

§ 9.04.050 Interference with Police Department.

(a) Resisting Officer. No person shall resist any police officer, any member of the police department, or any person duly empowered with police authority, while in the discharge or apparent discharge of his duty, or in any way interfere with or hinder him in the discharge of his duty, and upon conviction thereof, such person shall be punished as provided in Section 1.12.010 of this code.

Kansas City, Mo., Code of Gen. Ordinances § 26.35(a) (1976).

§ 26.35 Obstructing and Resisting City Officer.

(a) Any person who shall in any way or manner hinder, obstruct, molest, resist or otherwise interfere with any city officer or inspector or any member of the police force in the discharge of his official duties shall be guilty of a misdemeanor.

LaGrange, Ga., Code § 16-40 (1972).

§ 16-40 Peace Officers - Resisting, Obstructing, etc.

It shall be unlawful for any person to resist, obstruct, or oppose any policeman in making or attempting to make a legal arrest of any person or in serving or attempting to serve any legal process or order issued by the authorities of the city, county or state.

Lakewood, Colo., Municipal Code § 9.10.020 (1978).

§ 9.10.020 Interference with Policemen, Firemen, and Public Officials, in the Performance of their Duties.

(a) It is unlawful for any person to knowingly resist, interfere with, or impede or obstruct any policemen, firemen, city employee or other public official, who is attempting to discharge or in the course of discharging an official duty.

(b) It is unlawful for a person to threaten violence, reprisal or any other injurious act to any police officer, firemen, city employee or other public official who is engaged in the performance or attempted performance of his official duties or to make such a threat by reason or on account of the performing or attempted performance of his official duties.

Las Vegas, Nev., Municipal Code § 10.04.010 (1983).

§ 10.04.010 Interference with Peace Officer.

Any person who shall interfere with, resist, molest or threaten to molest any peace officer of the Las Vegas Metropolitan Police Department in the exercise of his official duties shall be guilty of a misdemeanor.

Mobile, Ala., City Code § 47-7 (1971).

§ 47-7 Resisting or Interfering with Officer; Assisting in Escape, etc.

If any person shall resist a police officer in the discharge of his duty or shall in any way interfere with or hinder or prevent him from discharging his duty as a police officer or offer or endeavor to do or assist any person in the custody of any policeman to escape or attempt to escape from such custody or rescue or attempt to rescue any person so in

custody, he shall be punished as provided in section 1-4.

Memphis, Tenn., Code of Ordinances § 28-14 (1984).

§ 28-14 Offenses Aginst Police Officers.

It shall be unlawful for any person to assault or commit a battery upon any member of the police force, to resist the lawful arrest by any member of the police force, to escape from any lawful arrest by a member of the police force, to aid and abet in the escape from lawful arrest, or to obstruct or interfere in any manner with any officer while in the performance of his lawful duties.

Phoenix, Ariz., Charter and Code § 23.18 (1969).

§ 23.18 Police-Obstructing, Resisting or Opposing.

Any person who shall knowingly or willfully obstruct, resist or oppose any policeman or other officer of the City authorized to make arrests, in serving or attempting to serve any lawful process or order of the City Magistrate or of any court of the City, or in the performance of any official duty, or who shall assault or beat any such officer or person duly authorized, when serving or executing, or attempting to serve or execute, or because of having served or executed, or attempted to serve or execute, any order or process of official duty, or when engaged in the performance of any official duty, shall be guilty of a misdemeanor.

Pittsburgh, Pa., Code § 601.14 (1979).

§ 601.14 Interference with Official Duties.

No person shall in any way interfere or cause or permit any interference with any City officer, employee or agent in their official duties.

St. Louis, Mo., Rev. Ordinances § 701.110 (1985).

§ 701.110 Interfering with Officer Unlawful.

It is unlawful for any person to interfere in any manner with a police officer or other employee of the County in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty.

Salt Lake City, Utah, Rev. Ordinances § 32-1-5 (1975).

§ 32-1-5 Interfering with Officer in Discharge of Duty Prohibited.

Every person who knowingly and willfully challenges to fight, assaults, strikes, verbally abuses, interferes with, resists, molests or threatens any police officer or city fireman of Salt Lake City while in the discharge of his official duties is guilty of a misdemeanor.

Sioux Falls, S.D., Rev. Ordinances § 26-16 (1972).

§ 26-16 Unlawful to Delay, Obstruct or Resist Public Officer.

It shall be unlawful for any person to willfully delay, obstruct or resist any public officer in the discharge or attempt to discharge any duty of his office.

Tacoma, Wash., Charter and General Ordinances § 8.17.015 (1986).

§ 8.17.015 Obstructing a Public Servant.

(a) A person shall be guilty of a misdemeanor if he/she shall knowingly:

(1) File false criminal charges against another person or make any false statement to a police officer who is making an investigation in the discharge of his/her official duties, or

(2) Hinder, delay, or obstruct any public servant in the discharge of his/her official powers or duties.

(b) For the purposes of this section, a public servant is a city of Tacoma police officer, Fire Department official, Human Society officer, park patrol officer, warrant officer, bailiff, Pierce County Sheriff, or Washington State Patrol Officer.

Tulsa, Okla., Charter and Rev. Ordinances § 71 (1981).

§ 71 Resisting Officers.

It shall be an offense for any person to knowingly or willfully in any manner, or with the assistance of any instrument or device, obstruct, resist, oppose, or interfere with any officer or member of the Police Department of the City of Tulsa, any special policeman of the City of Tulsa, any person having police powers by authority of the City of Tulsa or any person called to the assistance of any member of said Police department, special policemen or other persons having such police powers while in the discharge of their respective duties.

Tuscaloosa, Ala., Municipal Code § 17-14 (1962).

§ 17-14 Police Officers — Resisting, Interfering with, etc.

It shall be unlawful for any person, by word, or act, to resist arrest or to interfere with, resist, molest, obstruct, hinder or impede any police officer in the discharge of his duty or to assault, attack, strike, intimidate, threaten or to use abusive or approprbrious language toward any such police officer while in the discharge of his duty.

When a police officer of the city is engaged in the discharge of his duty as such and this then and there is, or would be, evident to a reasonably prudent person then present, and if such police officer is known to such person to be a police officer of the city or such police officer is in regular policemen's uniform or exhibits his badge or credentials as such police officer to any person, this shall of itself be prima facie notice to such person that the police officer is such and is then and there so acting.

Virginia Beach, Va., Code § 23-7 (1981).

§ 23-7 Resisting, Obstructing, etc., City Officers.

If any person, by threats or force, knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law enforcement officer, lawfully engaged in his duties as such, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a Class 1 misdemeanor.

Walnut Creek, Ca., Municipal Code § 3-5.304 (1978).

§ 3-5.304 Interference with Police and Authorized Officers.

It shall be unlawful for any person to interfere with or obstruct in any way any police officer or other officer or employee of the city in his enforcement of the provisions of this chapter. The removal, obliteration or concealment of any chalk mark or other distinguishing mark used by any police officer or other employee or officer of the city in connection with the enforcement of parking regulations of this chapter shall constitute such interference or obstruction. A violation of this section shall be a misdemeanor.

Waterloo, Iowa, Code of Ordinances § 31-2 (1970).

§ 31-2 Interference with Peace Officers.

No person shall interfere with any peace officer in the discharge of his duties by preventing, or attempting to prevent, delay or hinder him in the discharge of his duties.

Wilmette, Ill., Village Code § 12-8 (1977).

§ 12-8 Interfering with Village Officers.

It is unlawful for any person to interfere with, hinder or resist any officer or employee of the village while engaged in the duties of his office or employment.

TEXAS CITY ORDINANCES

Austin, Tex., Code § 9-1-2, p. 2197.

Sec. 9-1-2. Compliance with lawful orders of police officers; obstruction of police.

No person shall knowingly obstruct, prevent or interfere with any police officer who is engaged in the discharge of his or her official duty.

Blooming Grove, Tex., Code § 2C, p. 95.

C. Refusal To Aid An Officer.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor

El Paso, Tex., Code § 10.04.040, p. 692.

Sec. 10-04.040. Hindering police officer.

No person shall, whether by words, sounds, or acts, hinder, obstruct or impede, or attempt to hinder, obstruct or impede, any police officer of the city in the performance of any official duty of such officer, other than the making of an arrest or the service of process.

Frost, Tex., Code excerpt from Chap. 7 subsection C, p. 75.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere

in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Galveston, Tex., Code § 4-30, p. 398.

Sec. 14-30. Police — Interference.

It shall be unlawful for any person to obstruct, prevent or interfere with, or to attempt to obstruct, prevent or interfere with the chief of police or any other police officer in the lawful discharge of his duty within the city.

Hempstead, Tex., Code excerpt from § J, p. 153.

Executing Writs and Process and Powers of Office

It shall be the duty of the Chief of Police and each police officer to arrest, without warrant, all violators of the public peace and all who obstruct or interfere in the execution of the duties of their office.

Howe, Tex., Code excerpt from § 4 page 126.

(4) The chief of police may arrest, without warrant . . . all who obstruct or interfere with him in the execution of the duties of his office. . . .

Ingleside, Tex., Code excerpt from § C p. 154.

C. Duties

It shall be his duty to arrest, without warrant . . . all who obstruct or interfere with him in the execution of the duties of his office or who shall be guilty of any disorderly conduct or disturbance whatsoever. . . .

Jacinto City, Tex., Code § 18C, p. 29.

C. Interference with; unlawful

It shall be unlawful for any person to do any act, or utter any word, that would interfere, prevent or hinder in any lawful arrest while being made by a City Police Officer, Marshal, Assistant Marshal, or other peace officer. Any person who violates this Subsection shall be deemed guilty of riotous conduct and shall be fined in an amount not less than One ($1.00) Dollar and not more than Two Hundred ($200.00) Dollars.

Kilgore, Tex., Code § 19-17 (1960).

Sec. 19-17. Officers—Interfering with, imitating, resisting.

It shall be unlawful for any person to falsely represent himself to be an officer of the city, or, without being duly authorized by the city commission, to exercise or attempt to exercise any of the duties, functions or powers of a city officer or member of the police force, or to hinder, obstruct, resist, or otherwise inferfere with any city officer or member of the police force in the discharge of his official duties, or to attempt to prevent any such member of the police force or any officer of the city, from arresting any person, or to attempt to rescue from such officer or member of the police force any person in his custody, or to wear a badge similar to that worn by any official of the city, or any police officer of the city.

Killeen, Tex., Code Chap. 7, Art. 4 § 1, p. 445.

Section 1. Interfering with or obstructing officer.

Any person who may interfere with, obstruct, hinder, prevent, or attempt to prevent the chief of police, policeman, or any other officer of the city council in the discharge of their duty or its duty by word, act, or deed, threats, intimidation or by the officer of any pecuniary or other consideration, or in any manner, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five (5) nor more than one hundred dollars ($100.00).

Luling, Tex., Code § 15-29, p. 441.

Sec. 15-29. Obstructing performance of officer's duties.

If any person shall in any manner interfere with, obstruct or in any other way hinder any officer in the discharge of his official duties shall be deemed guilty of a misdemeanor.

McAllen, Tex., Code § 19-16, p. 667.

Sec. 19-16. Resisting police.

Any person who shall oppose or resist any police officer in discharge of his duties in this city shall be guilty of a misdemeanor.

Mission, Tex., Code § 23-3, p. 1347-48.

Sec. 23-3. Interfering with, obstructing officers.

It shall be unlawful for any person, in any manner, to interfere with, prevent or otherwise obstruct any

officer or employee of this city in the performance of his official duties.

Odessa, Tex., Code § 15-8, p. 348.

Sec. 15-8. Interference or obstruction.

Every person who shall obstruct or interfere with any policeman while such policeman is engaged in the execution of his duties shall be guilty of a misdemeanor.

Quinlan, Tex., Code excerpt from § B, p. 105.

If any person at the scene of an arrest being made by a police officer or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Rice, Tex., Code excerpt from § C, p. 88.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

River Oaks, Tex., Code § 16-16, p. 708.

Sec. 16-16. Hindering or Interfering with duties of police.

The chief of police, policemen and other members of the police department, shall arrest all persons who shall obstruct or interfere with them in the execution of the duties of their offices, or who shall be guilty of any disorderly conduct whatever.

San Antonio, Tex., Code § 32-5, p. 808.2.

Sec. 32-5. Obstructing police.

It shall be unlawful for any person to obstruct, prevent or interfere in any manner with the chief of police or any police officer, in the lawful discharge of his duty.

Seven Points, Tex., Code excerpt from § E, p. 64.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Strawn, Tex., Code excerpt from § C, p. 102.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Texarkana, Tex., Code § 15-5 (1961).

Sec. 15-5. City employees — Unauthorized direction of, interference with, etc.

Any person not an elected or appointed official of the city of Texarkana, Texas, who shall direct, control or interfere with, or attempt to direct, control or interfere with, any city employee while in the performance of his duties or performing the duties of his job or position of the city shall be guilty of a misdemeanor.

The term "city employee," as used in this section, is defined to mean any employee of the city in any

department, who receives compensation for his labor or services from the city and who is listed on the payroll of the city, as a full time or part time employee, and who works under and receives orders and directions from, through or under either an elected or appointed official of the city. The term "elected or appointed official" shall mean those officers of the city whose offices are created and defined by either the city charter or ordinances of the city.

Watauga, Tex., Code § 11, p. 20.

The Chief of Police, Policemen and other members of the Police Department, shall arrest all persons who shall obstruct or interfere with them in the execution of the duties of their offices, or who shall be guilty of any disorderly conduct whatsoever.

AMICUS CURIAE

BRIEF

No. 86-243

Supreme Court, U.S.
FILED
JAN 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,

Appellant,

—v.—

RAYMOND WAYNE HILL,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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INTEREST OF THE AMICI CURIAE[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization of over 250,000 members. The ACLU is dedicated to preserving and protecting the rights secured by the Constitution. Since its inception, the ACLU has participated in litigation to safeguard and to implement the guarantees of the Bill of Rights. The Texas Civil Liberties Union is one of the state affiliates of the ACLU. The Texas CLU and its Houston chapter participated as amicus curiae before the Fifth Circuit sitting en banc in the case at bar.

1/ The letters of consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF FACTS

Amici adopt the facts as presented by the appellee, but note here briefly the pertinent facts of appellee's arrest. Appellee Raymond Wayne Hill observed two Houston police officers questioning an acquaintance of Hill's. Hill's testimony showed that he believed that the officers might physically harm the man. From at least 25 feet away, Hill said to the officers words to the effect, "[L]eave him alone, he didn't do anything wrong," and then stated, "[L]eave him alone. Why don't you pick on somebody your own size?" One of the officers asked Hill, "[A]re you interrupting me in my official capacity as a Houston police officer?" to which Hill replied, "[Y]es. Why don't you pick on somebody my size?" The officer testified that a crowd had gathered around Hill (he failed to mention this in

Hill's trial in municipal court), but that it was not disorderly, did nothing illegal, and made no attempt to protest or interfere.

For speaking these words and with no forewarning and no order for Hill or the alleged crowd to move on or disperse, Hill was arrested and jailed. He was charged under Houston municipal ordinance § 34-11(a)[2/] ("the ordinance") with "interrupting" an officer by "verbal challenge". Following a non-jury trial in Houston municipal court, Hill was acquitted. Hill has been arrested under the ordinance on three other occasions;

2/ Code of Ordinances of the City of Houston, § 34-11(a) (1968) (uncodified but saved from repeal by Ordinance No. 85-1380): Assaulting or interfering with policemen. (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest." (emphasis added). Only the emphasized portion of the ordinance is at issue here. Assaulting or striking an officer, while constitutionally prohibitable, is preempted by Texas state law. See Tex. Penal Code Ann. §§ 1.08; 22.01-.03 (Vernon 1974).

in each case the charges were dismissed or Hill was acquitted.

SUMMARY OF ARGUMENT

The overbreadth doctrine has long played a vital role in the judicial protection of expressive activities from sweeping and loosely drafted state and local laws. "As applied" adjudication may sometimes be insufficient to prevent the chilling of First Amendment activities of both the litigant and others not before the court. Substantially overbroad laws also suffer from the same problem as vague laws: they delegate too great discretion to law enforcement officials, permitting arbitrary arrests and prosecutions. Particularly when a law regulates the extremely sensitive arena of citizen-police confrontation, the delegation of authority to the police must be carefully

defined so that legitimate criticism of ongoing police conduct is not suppressed.

The Houston ordinance is a classic example of a substantially overbroad law that permits arbitrary suppression of protected expression. First, Texas state law preempts the vast majority, if not all, of the ordinance's legitimate applications. Second, the law has been used to suppress monitoring or criticizing of police conduct, and is likely to deter others from such activities. Third, the law delegates to police virtually unfettered discretion to arrest citizens for speech or conduct they find annoying or offensive.

The City of Houston ("the City") belatedly claims that the federal courts should abstain from deciding whether the 100-year-old ordinance is unconstitutional because no state appellate court has ever construed it. Precedent and policy compel

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that this Court not entertain this argument, which was raised only after the City had lost on the merits in the Court of Appeals. In any event, Pullman abstention would serve no purpose in these circumstances. First, the ordinance does not present the federal courts with a difficult and unsettled question of state law. Second, the litigant himself has no way to return to state court to seek a limiting construction of the ordinance. Third, the likelinood of a limiting construction in the Texas courts that would save the ordinance is remote and speculative.

ARGUMENT

I. THE OVERBREADTH DOCTRINE PLAYS A VITAL ROLE IN PROTECTING AGAINST THE CHILLING OF FIRST AMENDMENT EXPRESSIVE ACTIVITIES INHERENT IN IMPRECISE AND SWEEPING LEGISLATION.

The overbreadth doctrine is "predicated on the sensitive nature of protected expression." New York v. Ferber, 458 U.S. 747, 768 (1982).[3/] It protects against a fundamental constitutional evil: that the very existence of a statute that sweeps too broadly in areas that the First Amendment protects "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded

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3/ The City did not present the merits of the substantial overbreadth issue to this Court. See Jurisdictional Statement at i (Questions Presented). Therefore, that question is not properly before this Court, Supreme Court Rule 15.1(a), and has been improperly raised in the Brief for Appellant, see Supreme Court Rule 34.1(a). Amici address the issue because they believe their discussion will aid the Court in understanding the doctrinal underpinnings and constitutional importance of the overbreadth doctrine.

as within its purview." Thornhill v. Alabama, 310 US. 88, 98 (1940). For almost half a century this Court has recognized that such sweeping laws are likely to cause not only the litigant, but others not before the court, to refrain from constitutionally protected speech or expression, and that therefore these laws must be stricken in toto. See, e.g., Secretary of State of Maryland v. J.H. Munson Co., 467 U.S. 947 (1984); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Thornhill, 310 U.S. 88 (1940); cf. Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973) (collecting overbreadth cases).4/

4/ The City claims that Hill lacks "standing" to raise an overbreadth challenge to the ordinance. Its argument, however, is not one of standing; rather, it turns on whether the ordinance is in fact substantially overbroad and whether this Court is prepared to immunize from facial attack statutes that are not, by their terms, directed against categories of speech. These claims are "more properly reserved (footnote cont'd)

The overbreadth doctrine, like its counterpart, the vagueness doctrine, is "strong medicine", to be cautiously dispensed. Broadrick, 413 U.S. at 613. Pursuant to both of these doctrines, once a court determines that a challenged law is fundamentally flawed, it may be invalidated "on its face" and can no longer be applied even to unprotected conduct until the legislature redrafts it or it is judicially

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for the determination of [Hill's] First Amendment challenge on the merits." J.H. Munson Co., 467 U.S. at 958-59. This Court has often accepted facial challenges to "core criminal conduct" laws because of their infringement of expessive activities. See, e.g., Kolender v. Lawson, 461 U.S. 352, 358 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 164-66 (1972); Coates v. Cincinnati, 402 U.S. 611 (1971). Whether a law aims at expressive activities or criminal conduct may affect the merits of an overbreadth challenge, but it is irrelevant to the question whether a litigant can make such a challenge. Also, a litigant may raise an overbreadth claim, whether or not his own conduct is constitutionally protected. See City Council v. Taxpayers for Vincent, 466 U.S. 789, 798 (1984); Broadrick, 413 U.S. at 612. In any event, the City did not present the standing issue to this Court in its Jurisdictional Statement and therefore it is not properly before the Court. Supreme Court Rules 15.1(a); 34.1(a).

limited. The justification for such "strong medicine" is the need, especially in the context of vigorous criticism of government activity, for a prophylactic approach to unbounded laws that assures the First Amendment the "breathing space" necessary for its vigorous exercise. Id. at 611.

Most First Amendment challenges to state regulations are amenable to "as applied," i.e., case by case, adjudication. This is because most statutes aim at a core of unprotected behavior and are drafted with some degree of specificity. On those few occasions when an adequately drafted statute is applied to protected conduct, the judiciary (state or federal) can explain either that the statute does not reach such conduct or that the application of the law to that individual's particular conduct is unconstitutional.

Some statutes, however, like the

ordinance before the Court in this case, fail to exhibit even a modicum of precision in drafting and fail to identify a cognizable core of unprotected activity. See Smith v. Goguen, 415 U.S. 566, 578 (1974); Coates v. Cincinnati, 402 U.S. 611, 614 (1971). Such statutes are burdened with two fundamental flaws. First, they may appear to proscribe so much protected activity that the statute's legitimate purposes are "dwarfed" by comparison. Cf. Ferber, 458 U.S. at 772. In such cases, society's interest in preventing the chilling of First Amendment activities compels that the substantially overbroad statute be voided on its face;[5/] "as applied"

5/ A substantially overbroad law has an in terrorem effect on protected activities of persons not before the court because it fails to inform them adequately of the primary conduct in which they may permissibly engage. Such a law "hangs over their heads like a sword of Damocles . . . . That this Court will ultimately vindicate [a litigant] if his speech is constitutionally protected is of little consequence -- for the value of a sword of Damocles is that it hangs -- not that it drops." Arnett v. Kennedy, 416 U.S.
(footnote cont'd)

adjudication would inadequately protect the First Amendment values at stake. See Broadrick, 413 U.S. at 612. Since Broadrick, when laws in fact threaten overbroad deterrence of First Amendment activities, this Court has not hesitated to void them on their face. See J.H. Munson Co., 467 U.S. 947; Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Erznoznik, 422 U.S. 205; Lewis v. City of New Orleans, 415 U.S. 130 (1974).

Second, overbroad laws, such as the Houston ordinance, fail to provide adequate guidance to law enforcement officials burdened with the responsibility of applying them, which results in an improper delegation of power to those officials. In Kolender v.

134, 231 (1974) (Marshall, J., dissenting). Thus, overbroad laws, no matter how clear their terms, engender problems of vagueness as well. See Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 871-75 (1970); L. Tribe, American Constitutional Law, § 12-26, at 714-16 (1978).

Lawson, 461 U.S. 352 (1983), the Court took notice of the long-recognized view that "vagueness and overbreadth [are] logically related and similar doctrines." Id. at 358 n.8. Overbroad laws in areas that lack bright-line constitutional distinctions inevitably suffer from the same vice that afflicts unconstitutionally vague laws: they encourage arbitrary and discriminatory enforcement, permitting "'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Id. at 358 (quoting Goguen, 415 U.S. at 575); Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

For over a century, the law has been clear that the legislature may not "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v.

Reese, 92 U.S. 214, 221 (1876), quoted in Papachristou, 405 U.S. at 165. This is because the very fact of arrest and prosecution entails significant costs to the litigant -- restraining him from engaging in protected activity before an adjudication of its constitutionality -- and to society -- deterring future activity by others as well as the litigant. See Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure.")6/

6/ An overbroad ordinance also often suffers the vice of lack of notice of what conduct is prohibited. For example, the definition of "interrupting" is so malleable that it has no core meaning by which citizens can guide their conduct. See,e.g., Goguen, 415 U.S. at 578; Coates, 402 U.S. at 614. How the police choose to interpret it will determine who is arrested. What a citizen fears it means, rightly or wrongly, will help determine the conduct in which he engages. Although Hill may have believed he was "interrupting" the officer, in fact Hill could not know whether the ordinance actually forbade his (footnote cont'd)

The moment of confrontation between citizen and police is one of the most sensitive in a free society. When a citizen criticizes police conduct there can be no appeal to the courts or higher officials before the officer decides how to react. If constitutionally protected expression is to be indeed protected, the legislature must provide rules that guide police conduct at this critical juncture, even if "great precision" is not possible. Goguen, 415 U.S. at 581. Laws that fail to provide adequate guidance result in a substantially overbroad delegation to the officer in the field that permits him to suppress arbitrarily protected behavior.

It is not unreasonable to expect that police will be most likely to overreact in those situations in which their own on-the-

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conduct (apparently it did not, as he was acquitted at trial) or whether the officer would interpret the ordinance to apply to Hill's conduct.

scene behavior is being questioned. When a law, such as the Houston ordinance, delegates to the officer almost unbridled and arbitrary discretion to respond to that criticism by arresting the speaker, the likelihood of overreaction is greatly increased. When, however, the legislative delegation of authority to the officer enables him to discern with reasonable accuracy which behavior the law covers, he is less likely to abuse that authority at the expense of free speech interests.

This Court has shown a special solicitude to protect citizens from overbroad or vague laws that delegate to police officers in the field too great discretion to suppress protected expression. See, e.g., Kolender, 461 U.S. at 358; Papachristou, 405 U.S. at 171, Coates, 402 U.S. at 614; see also Lovell v. Griffin, 303 U.S. 444 (1938). When that expression is criticism

directed at the police themselves, the necessity for adequate egislative guidance is heightened because lawmaking cannot be entrusted "'to the moment-to-moment judgment of the policeman on his beat.'" Gogven, 415 U.S. at 575 (quoting Gregory v. City of Chicago, 394 U.S. 111, 120 (1969) (Black, J., concurring); see also Lewis, 415 U.S. 130. Laws that not only tolerate, but effectively encourage, suppression of on-the-scene criticism of police conduct are thus deserving of this Court's most careful scrutiny.

II. THE HOUSTON ORDINANCE IS SUBSTANTIALLY OVERBROAD AND CHILLS PROTECTED EXPRESSION

For 100 years, Houston police officers have enforced § 34-11(a) as literally written. No state appellate court has ever construed it; Houston municipal courts apparently have refused to limit its reach.

By its terms, as the City belatedly concedes before this Court, "the ordinance can be applied to a wide variety of activities, some of which concededly cannot constitutionally be punished." Jurisdictional Statement, at 7. What the City fails to concede, or even to acknowledge, is that Texas law preempts most, if not all, legitimate applications of the ordinance.

This ordinance presents a classic example of the evils against which the overbreadth doctrine protects. The random and indiscriminate use of the ordinance presumptively deters citizens from engaging in protected activity, including monitoring or criticizing on-the-scene actions of the police. Moreover, the ordinance suffers from the primary vice of vague laws, delegating to the police virtually unbridled and arbitrary discretion to arrest citizens for speech or conduct they find annoying or offensive, a

power that is frequently exercised.

A. Texas State Law Preempts The City From Criminalizing Most, If Not All, Unprotected Behavior Directed Against A Police Officer

That the City abandoned its defense to the claim of substantial overbreadth in its Jurisdictional Statement, see note 3, supra, is not surprising. In light of Texas state law, it is difficult to discern what speech or conduct the municipal ordinance reaches that the First Amendment does not clearly or at least arguably protect. Assuming that the challenged portion of the ordinance reached a significant core of protected activity prior to 1974, since then that core has been virtually eliminated. Under Tex. Penal Code Ann. § 1.08 (Vernon 1974), in effect since January 1974, no municipality "may enact or enforce a law that makes any conduct covered by this code an offense subject to criminal

penalty."[7] See Knott v. State, 648 S.W.2d 20, 21 (Tex.Ct.App. 1983) (where state and municipal law proscribe similar conduct, local law is void under § 1.08).

Because Texas state law prohibits the vast majority, if not all, speech and conduct directed at police officers that may be constitutionally regulated, municipalities are left with very little behavior that they

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[7] The City quite properly looks to Texas statutes to impose a mens rea requirement on the ordinance. See Tex. Penal Code Ann. § 6.02 (Vernon 1974). It is therefore somewhat surprising that the City refuses to acknowledge the construction that § 1.08 imposes on the ordinance. When this Court evaluates the constitutionality of state laws it is bound by state court limiting constructions. See, e.g., New York v. Ferber, 458 U.S. 747, 769 n.24. The principles of federalism and comity that compel this deference also compel the federal courts to be bound by limitations state legislatures impose upon the reach of municipal ordinances.

may lawfully criminalize.[8] See Tex. Penal Code Ann. (Vernon 1974 & Supp. 1986): §§ 22.01-22.03 (physical assaults, offensive or provocative physical contact, threats of bodily harm against peace officers); § 22.05 (reckless conduct); § 22.07 ("terroristic threat"); § 37.08 (false report to peace officer); § 38.02 (failure to identify as witness); §§ 38.03-05 (resisting, evading or hindering arrest); §§ 38.07-.08 (escapes); § 38.13 (hindering proceedings by disorderly conduct); § 38.14 (preventing execution of civil process); §§ 42.01-.03, .05 (disorderly conduct, riot, obstructing highway or

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[8] Courts may hesitate to facially invalidate laws because such action eliminates regulation of prohibitable conduct until the law is redrafted or judicially limited. That concern is completely absent here, where state law remains in place to criminalize almost all unprotected behavior directed against police officers. The City recognized that its ordinance was superfluous when it decided to repeal it; it was saved from repeal only to avoid liability for legal fees. See Brief for Appellee (quoting "Request for Council Action").

passageway, disrupting meeting or procession); § 42.06 (false alarm or report). The Texas disorderly conduct law, § 42.01, is itself quite broad, covering such speech or conduct as abusing, cursing, or threatening another in a manner tending to incite an immediate breach of the peace.[9/]

In essence, the only behavior the ordinance covers that state law does not preempt involves nonphysical and non-threatening speech or behavior that "interrupt[s]" a police officer in the sense that it annoys, upsets, or irritates him while performing his duties. While one can imagine unpreempted applications of the ordinance to unprotected activities, it is clear that the vast majority will be directed

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9/ An individual engaging in "speech or other communication" cannot be arrested for "Unreasonable Noise", § 42.01(a)(5), or "Obstructing Passageway", § 42.03, until a peace officer has made a reasonable order for him to move on and he has disobeyed that order. Tex. Penal Code Ann. § 42.04.

against behavior that the First Amendment protects.

The record in this case is replete with examples of the sorts of activities that the Houston police have treated as criminal under this ordinance. These include such "crimes" as "Refusing to remain silent"; "Failure to remain silent and stationary"; "Arguing and yelling"; "Arguing";, "Talking"; "Interfering"; "Verbal abuse"; "Shot Finger at Officer"; "Verbally yelling"; "Cursing"; and "Talking loudly". Hill v. City of Houston, 789 F.2d 1103, 1113-4 (5th Cir. 1986) (en banc) (Appendix). Hill himself was arrested for "Verbal challenge."

B. An Examination of Hill's Behavior Demonstrates the Ordinance's Unconstitutional Reach

Hill's own behavior that resulted in the arrest challenged here amply demonstrates the overbroad and impermissible delegation of authority that the ordinance gives to the

Houston police.[10] Peaceful verbal protest of a police officer's actions is precisely the sort of behavior that our Constitution protects. Moreover, the criminal codes generally do not punish such behavior. See, e.g., Thompson v. City of Louisville, 362 U.S. 199, 205-06 (1960); District of Columbia v. Little, 339 U.S. 1, 6 (1950); Model Penal Code and Commentaries § 250.2 Comment 7, at 349 (1980) (Disorderly Conduct -- "Altercations and Policemen").

This Court has long recognized that the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964), including law enforement officials, see, e.g., Lewis, 415 U.S. 130; id. at 135

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[10] Whether or not Hill's conduct is constitutionally protected is immaterial to an overbreadth challenge, although Hill continues to assert, correctly we believe, that it is protected.

(Powell, J. concurring), (police "may reasonably be expected to exercise a higher degree of restraint than the average citizen"). Police officers must not be "so thin-skinned as to arrest bystanders for remarks that pose no danger to them or to the execution of their duties." Hill, 789 F.2d at 1112.

Although the ordinance is not aimed at prohibiting classes of speech or expressive conduct, such as the unconstitutionally overbroad ordinances in Erznoznik, supra, and Schaumberg, supra, its language is so broad that speech clearly falls within its intended confines and the police and prosecutors have so construed and applied it. See Hill, 789 F.2d at 1113-14 (Appendix). The First Amendment, however, permits criminalization of only "narrowly limited classes of speech." Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942).

The City claims that citizens are arrested not because of the content of their speech, but rather because of its impact -- it interrupts an officer in the performance of his duty. Such reasoning is circular and simply restates the issue. The constitutional question is not whether the City can arrest someone who "interrupts" a police officer, nor whether speech can in fact "interrupt" an officer,[11] but rather what

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[11] If an individual approached a police officer who was handing out a traffic summons and said, "Excuse me for interrupting, Officer, but a man's been shot down the street," he has committed all the elements of a crime under the ordinance, including possessing the mens rea of intentionally interrupting the officer. The City and the dissent, 789 F.2d at 1124, think that reading in a mens rea requirement goes far towards curing the ordinance's substantial overbreadth. But the "intent" requirement in criminal law has never meant an intent to commit a crime and it is not so defined under Texas law. See Tex. Penal Code Ann. § 6.03(a) (Vernon 1974) ("A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result"). In the posited hypothetical, the citizen clearly had the intent to interrupt the officer. The only distinction between this case and Hill's would be the police officer's arbitrary (footnote cont'd)

kinds of speech or other expressive activities that cause some degree of "interruption" may be constitutionally punished.

Speech that is directed at inciting, and is likely to incite, immediate danger to the public order, including legitimate law enforcement efforts, is not protected. See, e.g., Gooding v. Wilson, 405 U.S. 518, 522-23 (1972); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Speech that an officer finds annoying, Coates, 402 U.S. 611, or abusive, Lewis, 415 U.S. 130, cannot be the basis of punishment. Nor can non-threatening speech that "interrupts" a police officer only because the officer chooses to confront rather than ignore the challenger be made criminal. Hill's speech was arguably "provocative and challenging," Terminiello v.

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decision that one interruption was for a legitimate purpose and the other was not. The ordinance itself provides the officer with no guidance.

City of Chicago, 337 U.S. 1, 4 (1949), but that is precisely the sort of speech the First Amendment protects and it is "one of the chief distinctions that sets us apart from totalitarian regimes." Id.

The dissent and the City rely on Colten v. Kentucky, 407 U.S. 104 (1972), for their contention that Hill's speech, and presumably a wide variety of other speech and conduct that would "interrupt" a police officer, is not constitutionally protected. Colten, however, was not arrested for his speech and this Court in no way intimated that Colten's speech could have been the basis for his arrest. Rather, he was arrested for refusing to move on after he (along with several others) stopped his car on a highway to inquire into the police stop of a friend. 407 U.S. at 106-07. "Colten's conduct in refusing to move on after being directed to do so was not, without more, protected by the

First Amendment." Id. at 109 (emphasis added).

This distinction is not one of semantics; it is fundamental. A person may have no First Amendment right to engage in speech when his physical presence creates a safety hazard (e.g., cars parked on or along a highway). That is the essence of a reasonable time, place, and manner restriction. Unlike the ordinance, Texas law recognizes this distinction in Tex. Penal Code Ann. § 42.04, which requires a reasonable order to move on before a person can be arrested for speech or communication. In Hill's case, however, he was not arrested for threatening an officer's safety, refusing to move on, or otherwise creating a safety hazard. He was, plain and simple, arrested for speech -- "verbal challenge" -- that annoyed a police officer.

Had Hill stopped his car on the highway

and then spoken to the officer as he did, he too could have been arrested under Texas law (although not under Houston's preempted ordinance) if he refused a reasonable order "to move on". See Tex. Penal Code Ann. § 42.03 (obstructing highway or passageway); § 42.04. Similarly, if in fact a crowd did gather around Hill, presumably § 42.03 would have authorized the police to demand that it disperse if the sidewalk was blocked; section 22.01 or § 42.01 would have permitted an arrest if Hill had in fact threatened an officer.

Hill's speech, and speech similar to it, however, is not a crime under Texas law, Colten, or the Constitution; it is a crime only under the ordinance. If the City continues to believe, despite extensive and preemptive state regulations and its own decision to repeal the ordinance, that it has legitimate interests to protect, it may do so

by a narrowly drawn statute tailored precisely to the conduct the City wishes to proscribe (and that is not already regulated by state law).

C. This Ordinance Demonstrates The Vagueness Problems Latent in Overbroad Laws

The court below did not reach the question of the ordinance's vagueness, but this law demonstrates the soundness of the traditional view that "vagueness and overbreadth [are] logically related and similar doctrines." Kolender, 461 U.S. at 358 n.8. Unlike the statutes in Brockett v. Spokane Arcades, Inc., 86 L.Ed.2d 394 (1985), or Time, Inc. v. Hill, 385 U.S. 374 (1967), there are no clearly articulable categories of protected expression that can be removed from the reach of this ordinance. In other words, this Court cannot impose a constitutional gloss on the ordinance that will save it from being overbroad without

rendering it impermissibly vague.

In Spokane Arcades, the Court rejected a facial overbreadth challenge to an unconstitutional state obscenity law because it could excise the single word in the statute - "lust" - that otherwise rendered it invalid. 86 L.Ed.2d at 406. Similarly, in Time, Inc., there was no need to strike down in toto the New York privacy statute because the Court could articulate a category of speech -- speech made "without proof of knowing or reckless falsity," 385 U.S. at 397 -- that was constitutionally protected and thus outside the reach of the otherwise valid state law.

In those two cases, the Court relied on categories of expression protected by the First Amendment that could be clearly defined to fall outside the reach of the statute. See Tribe, § 12-26, at 716 n.13. The Court did this without providing narrowing

constructions to the statutes themselves, a task properly left to the states. See, e.g., Erznoznik, 422 U.S. at 216 & n.15. The Court, in Time, Inc., also assumed "that the New York courts will apply the statute consistently with the constitutional command," thereby eliminating any remaining need to invalidate the statute on its face. 385 U.S. at 397.

By contrast, the Houston ordinance does not aim at behavior that can be neatly compartmentalized into categories of privilege and prohibition. Rather, the ordinance aims at a broad range of widely disparate conduct in an area in which constitutional principles lack precise definitions. None of its terms are susceptible to a constitutional gloss that would eliminate the statute's overbreadth without substituting the vice of unconstitutional vagueness. See, e.g.,

Aptheker, 378 U.S. at 515-17 (to construe overbroad statute to find "some core of constitutionality would inject an element of vagueness into the statute's scope and application").

Legislation in the murky constitutional waters of disorderly conduct or breach of peace laws will be somewhat imprecise. See, e.g., Goguen, 415 U.S. at 581. While great precision in this area may not be possible, the imprecision may not be unbounded. See, e.g., Gooding, 405 U.S. at 527 ("'breach of peace' merely to speak words offensive to some who hear them, and so sweeps too broadly."); Coates, 402 U.S. at 611 (holding unconstitutional ordinance that makes it a crime for "three or more persons to assemble" on sidewalks and "in a manner annoying" to passersby); Papachristou, 405 U.S. 156

(vagrancy ordinance void for vagueness).12/

The ordinance delegates to the police the discretion to suppress any and all on-the-scene speech critical of a police officer's conduct, as well as a wide variety of other expressive activites. The law permits, and the City's practice has been, exactly that conduct condemned in Reese and Papachristou: the legislature may not "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large". Reese, 92 U.S. at 221, quoted in

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12/ Where speech is at issue, because "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," Speiser v. Randall, 357 U.S. 513, 525 (1958), "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) (quoted in Gooding, 405 U.S. at 522). Moreover, "where a statute imposes criminal penalties, the standard of certainty is higher." Kolender, 461 U.S. at 358 n.8.

Papachristou, 405 U.S. at 165. Four times Hill has been arrested under the ordinance; four times the charges were dismissed or Hill was acquitted.

The City argues that the First Amendment permits the police to deny to citizens at the scene of a police action the opportunity to state peacefully and non-threateningly their objections to what they perceive, rightly or wrongly, to be police misconduct. As important, the City urges this Court to uphold a law that completely fails to guide the police in the sensitive and critical area of police-citizen contact or to inform citizens of what behavior is permissible. The result is arbitrary enforcement and impermissable cowing of the citizenry. For every Raymond Hill, who is committed to observing and confronting potential police misconduct on the street, how many others will choose to stand mute or to turn away

from questionable official actions in order to steer clear of the hanging sword of arbitrary arrest and prosecution?[13/]

III. THIS COURT SHOULD NOT CONSIDER THE CITY'S UNTIMELY ABSTENTION ARGUMENT; IN ANY EVENT, THIS CASE PRESENTS NONE OF THE REASONS THAT SUPPORT PULLMAN ABSTENTION.

A. The City's Abstention Claim is Untimely and Inconsistent with Federalism Principles

After litigating the issue on the merits for over three years, the City belatedly claims that the federal courts should abstain from deciding the facial overbreadth of the ordinance under Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). The City

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13/ The ordinance's actual deterrence of protected activity is neither remote nor speculative in this case. Hill is a highly visible member of Houston's gay community and the Montrose neighborhood. There is little question that Hill's arrests and the facts behind those arrests are well known in that community. Persons are thus on notice that speech tending to cause minor interruptions of a police officer may result in their arrest, and most people quite reasonably will steer wide of any such behavior.

argues that -- although no Texas appellate court has construed the ordinance in its 100-year existence -- abstention is appropriate because a limiting and saving construction may occur at some remote, speculative future date in a proceeding involving an unknown individual.[14/] The timing and content of the City's abstention argument demonstrates a fundamental misconception of the function of the abstention doctrine, particularly in the First Amendment context. More important, it ignores the proper functioning of the federal courts and

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14/ The City ignores the fact that the Houston municipal courts, which are courts of record, have interpreted the ordinance by explicitly rejecting the opportunity to limit its reach. For example, the prepared charge form simply gives the jury the ordinance with no limiting construction other than a requirement of willfulness. See Plaintiff's Ex. 4 (charge in Texas v. Wong). In Wong, the municipal court also denied a motion challenging the ordinance's constitutionality. See Plaintiff's Ex. 5. Jury instructions act as a construction of an ordinance that is binding on the federal courts. See Terminiello, 337 U.S. at 4.

the most basic principles of federalism.

The City never raised the abstention issue until its Suggestion for Rehearing En Banc to the Fifth Circuit, only after it had lost on the merits before a panel of the Fifth Circuit. 764 F.2d 1156 (5th Cir. 1985). No member of the en banc court addressed the City's untimely argument.

Both policy and precedent demand that this Court reject consideration of the abstention claim. If this Court condones the City's tactics, a state or local government could submit to constitutional adjudication on the merits until it lost and then argue that the court had acted improperly in reaching the merits. The City properly could have argued both the merits and abstention to the district court (although the district court would have acted incorrectly had it abstained). But the City's position tells the federal judiciary that it has the

discretion to rule for the City, but not against it. And in those cases when abstention is appropriate, the tactic would waste enormous amounts of judicial time and other resources.

Precedent also compels rejection of consideration of the abstention issue at this late date. The federal appellate courts have long followed the sensible rule that arguments not raised below will not be heard on appeal, absent special circumstances. See, e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 29 (1983); Weathersby v. Conoco Oil Co., 752 F.2d 953, 958 (5th Cir. 1984). No such circumstances exist here, and the City points to none. The same abstention argument raised for the first time before the Fifth Circuit sitting en banc was available before both the District Court and the Fifth Circuit panel. Moreover, failure to consider the untimely

claim does not cause the City any prejudice.[15] The Court of Appeals declined to exercise its discretion to address the argument and this Court should do likewise. See Moses H. Cone, 460 U.S. at 29.

A state waives its abstention claim when it has "expressly urged this Court or the District Court to proceed to an adjudication of the constitutional merits," and "voluntarily submit[s] to federal jurisdiction even though it might have had a tenable claim for abstention." Ohio Civil

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15/ On the other hand, the City's tactic causes Hill to suffer enormous prejudice. First, if this Court does abstain, Hill has no recourse to the state courts. Even if Hill could litigate the ordinance's reach in state court, he would have suffered the delay and expense of four years of needless litigation through the entire federal judicial system. In addition, since the City never raised the argument that abstention is appropriate because no court had construed the ordinance, appellee had no reason or opportunity to present the trial court with evidence that the municipal courts had in fact consistently construed the ordinance to reach the full extent of behavior that the ordinance, by its terms, appears to regulate. See n.14, supra.

Rights Commission v. Dayton Christian Schools, Inc., 91 L.Ed.2d 512, 521 (1986) (emphasis added); see also Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 480 (1977) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system."). When the State has voluntarily submitted the constitutional question to the federal courts, federal-state comity, which is the principle underlying abstention doctrine, would not be advanced. Dayton Christian Schools, 91 L.Ed.2d at 521; Brown v. Hotel Employees, 468 U.S. 491, 500 n.9 (1984).16/

16/ This Court has indicated that a federal court may raise the abstention question sua sponte. See Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976). However, failure to raise the issue is a factor against abstaining. See Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 329 (1964); Professional Plan Examiners of New Jersey, Inc. v. LeFante, 750 F.2d 282, 290 (3d Cir. 1984). Except in Railroad
(footnote cont'd)

B. None of the Reasons For Pullman Abstention Exists in This Case

Should the Court choose to address the merits of the issue, abstention must be refused. This case is a paradigm of an instance in which Pullman abstention is inappropriate. Abstention is an equitable doctrine; it does not implicate the federal court's jurisdiction. Hence, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule....'It is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.'" Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976) (quoting

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Commission v. Pullman Co., 312 U.S. 496 (1941), in which the abstention doctrine was first enunciated, this Court has apparently never abstained sua sponte. Abstention on the Court's own initiative, while not improper, is unquestionably in tension with the abstention rationale put forth in Dayton and Hodory.

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 188 (1959)); see Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984).

1. The question of state law is not unsettled

In Pullman, "this Court held that federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." Midkiff, 467 U.S. at 236 (emphasis added). In the case at bar, the federal question need not await resolution of state law issues. The question of state law is not "unsettled," and "the abstention doctrine 'contemplates that deference to state court adjudication only be made where the issue of state law is uncertain.'" Babbitt v. United Farm Workers National Union, 442 U.S. 289, 306 (1979) (quoting Harman v. Forssenius, 380 U.S. 528, 534

(1965)). The mere fact that a state appellate court has not construed a state law does not make that law uncertain, see Zwickler v. Koota, 389 U.S. 241, 251 (1967); Harman, 380 U.S. at 534-35; neither does the mere possibility that state courts might alter the readily discernable meaning of a statute. See Harris County Commissioners Court v. Moore, 420 U.S. 77, 84 (1975).

In Babbitt, the Court examined the language of the challenged provisions to determine whether the statute was "unsettled," finding them susceptible to "a choice between one or several alternative meanings," 442 U.S. at 308, and "patently ambiguous," id. at 312. By contrast, the reach of the ordinance is not particularly uncertain. By its terms, it reaches behavior that negatively impacts on a police officer's performance of his duty. Although the law is "unsettled" in the limited sense that the

state appellate courts could theoretically impose an unlikely complex of limiting constructions on its broad terms, that is not the relevant inquiry. See id. at 307-12.

2. Abstention would serve none of the doctrine's purposes

Even if the ordinance falls into the category of laws in which Pullman abstention is appropriate to consider, numerous factors strongly militate against abstention. First, the City ignores one of the fundamental pillars of the Pullman doctrine. When a federal court abstains, the litigant himself is remanded to state court to adjudicate his state law claims. In Pullman itself, the Court emphasized, "The law of Texas appears to furnish easy and ample means for determining the Commission's authority," and it noted "the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the

constitutional claim." 312 U.S. at 501; see also 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4242, at 453 (1978). This Court has never suggested that abstention is appropriate when the litigant himself cannot go to state court, but instead must await the outcome of some remote, speculative proceeding involving parties wholly unrelated to him. See, e.g, Hillsborough Township v. Cromwell, 326 U.S. 620, 628 (1946); Georgevich v. Strauss, 772 F.2d 1078, 1092 (3d Cir. 1985).

Here, there is no state civil proceeding under which Hill can bring the ordinance before the state courts for a construction of its meaning without forfeiting his right to adjudicate his constitutional claims in federal court.[17/] See, e.g., City of Fort

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[17/] The City incorrectly suggests that Hill could seek a construction of the statute in the state courts pursuant to 42 U.S.C. § 1983. Jurisdiction in a section 1983 suit is predicated on a violation of a (footnote cont'd)

Worth v. Craik, 411 S.W.2d 541, 542-43 (Tex. 1967) (even when no ongoing criminal proceedings, equity court will not interpret penal statute unless irreparable injury to vested property rights at issue; validity may be challenged only in criminal proceedings); see also Dearing v. Wright, 653 S.W.2d 288 (Tex. 1983); Texas Liquor Control Board v. Canyon Creek Land Corp., 456 S.W.2d 891, 894 (Tex. 1970).

Moreover, even if the civil courts took

---

federal right. Once the federal question has been put before a state court, a federal court is precluded from reconsidering the question. See Allen v. McCurry, 449 U.S. 90 (1980); cf. Migra v. Warren City School District, 465 U.S. 75 (1984). Under England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 421 (1964), a plaintiff may employ a state court procedure to raise state law questions, reserving his federal questions for his return to federal court. Such a procedure is not possible under section 1983, which is predicated on the assertion of federal rights. Under Texas law, the England procedure cannot be employed, and the federal court must give up jurisdiction to allow state court adjudication of state law issues. See Moore, 420 U.S. at 88 n.14; United Services Life Insurance Co. v. Delaney, 396 S.W.2d 855 (Tex. 1965); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure, § 4243, at 473 (1978).

jurisdiction, under Texas' strict justiciability requirements those courts will do no more than examine the ordinance as it applies to Hill's behavior, and thus the extensive constructions necessary to render the ordinance constitutional are extremely unlikely. See State v. Scott, 460 S.W.2d 103, 107-08 (Tex. 1970); Firemen's Insurance Co. v. Burch, 442 S.W.2d 331, 333 (Tex. 1968); Gholson v. State, 667 S.W.2d 168, 173 (Tex.Ct.App. 1983). The City fails to point to any state court procedure by which Hill could challenge the scope of the ordinance because none exists.[18/]

[18/] Had Hill (or any of Hill's four witnesses in the District Court) been convicted on any of his four arrests, he could, at least in theory, have wended his way, with the assistance of counsel, through the state appellate "maze," 789 F.2d at 1111, and possibly obtained a limiting construction of the ordinance. But Houston's practice is to allow the police to use the ordinance as a dragnet law, and then to rely on the courts to sort the innocent from the guilty, a practice condemned in Reese, 92 U.S. at 221, more than 100 years ago.

Second, when a federal court cannot readily anticipate that a single state court proceeding will result in a constitutional limiting construction of a statute, abstention is inappropriate. See Babbitt, 442 U.S. at 308; Baggett v. Bullitt, 377 U.S. 360, 378 (1964). The ordinance reaches a broad and diverse range of protected activity, and one can reasonably expect that "extensive adjudications, under...a variety of factual situations," Baggett, 377 U.S. at 378, will be required to bring the ordinance within permissible constitutional boundaries. Its constitutionality simply does not turn on "'a choice between one or several alternative meanings.'" Babbitt, 442 U.S. at 308 (quoting Baggett, 377 U.S. at 378).

Third, Pullman abstention is inappropriate when "the possible benefits of abstention become too speculative to justify

or require avoidance of the question presented." Hodory, 431 U.S. at 481. As in Hodory, "[t]hat point has been reached and surpassed here." Id. Here, the benefits of abstention are entirely speculative. No Texas appellate court has addressed this ordinance in 100 years, no state civil procedure exists for Hill to challenge it, and there is little likelihood that a single challenge would resolve the need for a federal constitutional decision. And, as the court below and appellee explain, the appellate procedure for one arrested under the ordinance, the small size of the fine, and the likelihood of dismissal or acquittal for a represented defendant (i.e., a defendant most likely to raise a constitutional challenge), makes an appeal highly improbable, if not theoretically impossible. See Hill, 789 F.2d at 1111.

Finally, this Court has been especially

reluctant to abstain when there already has been considerable delay. Here, of course, the four-year delay that Hill would suffer if abstention were ordered is solely attributable to the City's tactics. Especially where First Amendment rights may be chilled during the delay, abstention must be invoked only in special circumstances. See Zwickler, 389 U.S. at 252; Moore, 420 U.S. at 83.

3. Recent cases demonstrate abstention is inappropriate here

Two recent cases upon which the City relies -- Spokane Arcades and Babbitt -- demonstrate the impropriety of abstention in these circumstances. In Spokane Arcades, respondents brought suit in federal court four days after the effective date of a state statute regulating obscenity and sought to have it declared unconstitutional on its face. 86 L.Ed.2d at 399. Although the state courts had not had an opportunity to address

the statute, and although it had never been enforced, the Court addressed the substantive constitutional question and partially invalidated the statute.

Three Justices argued that the "federal courts should have abstained and allowed the Washington courts an opportunity to construe the state law in the first instance." Id. at 408 (O'Connor, J., concurring). The concurrence criticized the federal courts for "precipitously indulging a facial challenge" to this four-day-old statute, noted that the statute was readily susceptible to a limiting construction in light of this Court's pronouncements on obscenity law, and pointed out the ready availability of state judicial procedures for an interpretation of the ordinance. Id. at 409-10. Yet neither the majority opinion nor the dissent even referred to the possibility of abstention.

In Babbitt, appellees challenged the

constitutionality of the recently-enacted complex and comprehensive statute that regulated labor relations between agricultural employers and employees. The Court abstained from deciding the constitutionality of the consumer publicity provision because it was "patently ambiguous," 442 U.S. at 312, a likely state court interpretation would render it constitutional, and the statute was susceptible to resolution in a single state challenge. Id. at 308-12.

None of the factors favoring abstention noted in Babbitt or Spokane Arcades are even arguably present here. When Hill challenged this ordinance, it was over 96 years old, not four days, and it had been applied thousands of times. This case is hardly an example of federal courts "precipitously indulging a facial challenge." 86 L.Ed.2d at 409.

Unlike the statute in Babbitt, the

ordinance, by its terms, is not particularly ambiguous. Moreover, construing this ordinance to avoid unconstitutional overbreadth would require considerably more surgery than would the statute at issue in Spokane Arcades, in which excision of the word "lust" rendered the statute constitutional, or Babbitt, in which the statute's constitutionality could be resolved in a single state proceeding. Instead, only a series of adjudications resulting in speculative and unlikely constructions could save the ordinance. Finally, the City can point to no state procedure whereby Hill may seek a construction of the ordinance.19/

19/ Should this Court find abstention appropriate, it should direct the District Court to enjoin enforcement of the ordinance pending a definitive resolution of the issues in the Texas courts. See Babbitt, 442 U.S. at 312 n.18; id. at 318 n.7 (Brennan, J., dissenting); Harrison v. NAACP, 360 U.S. 167, 178-79 (1959).

CONCLUSION

The ordinance impermissibly delegates to police officers broad authority to suppress substantial amounts of protected expression. Moreover, state law has preempted any core of prohibitable conduct that the ordinance may have once legitimately regulated. Therefore, this Court should affirm the decision of the Fifth Circuit, which held the ordinance substantially overbroad. The City's untimely abstention argument should not be considered; in any event, there is no basis for Pullman abstention.

Respectfully submitted,

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BEST AVAILABLE COPY

AMICUS CURIAE

BRIEF

MOTION FILED

FEB 13 1987

No. 86-243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THE CITY OF HOUSTON, TEXAS,
Appellant,

v.

RAYMOND WAYNE HILL,
Appellee,

On Appeal from the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE, AND BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF APPELLANT, CITY OF HOUSTON

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 36 of the Rules of this Court, amicus National Institute of Municipal Law Officers (NIMLO) on behalf of its more than 1,900 member local governments, respectfully moves this Court for leave to file out of time the attached brief as amicus curiae in support of the Appellant, City of Houston.

NIMLO is a national organization comprised of municipalities, local government units, or political subdivisions of states. The Appellant, City of Houston, is a member of NIMLO. These member local governments operate NIMLO through their chief legal officer, variously called city or

county attorney, corporation counsel, city solicitor, law director, and other titles. The accompanying brief is signed by the attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and as the authorized law officer of each of their municipalities. Both parties have consented to NIMLO's filing of this brief as amicus and letters stating that fact have been lodged with the Clerk.

It is not now, and never has been, NIMLO's policy to volunteer its services as an amicus to the various municipalities which may have a case before the Court. Rather, NIMLO's amicus participation occurs when a municipality requests NIMLO to evaluate a case for possible nationwide impact and to consider whether amicus support is warranted. Upon receiving such a request, the case in question is reviewed by NIMLO's Legal Advocacy Committee, a body comprised of 11 NIMLO members. That Committee's recommendations and the case itself is then reviewed by the NIMLO Executive Committee who have signed and now submit this brief on behalf of NIMLO members and for their own municipalities, both of whom are political subdivisions of states. The Legal Advocacy and Executive Committees have unanimously recommended that NIMLO file this amicus brief in this case.

The local government attorneys who operate NIMLO are responsible for advising their city governments on the best methods of serving the legitimate local interest in promoting safe and effective law enforcement. Local governments are well aware that law enforcement officers must often carry out their responsibilities in an environment charged with the potential for violence, where unwarranted interference can threaten the safety of both the officers and the public. As a consequence, the Federal Government, hundreds of cities and virtually all states have enacted laws similar in substance to the Houston ordinance. See Appendices A, B and C.

Thus, the impact of this case goes far beyond what its effects will be on the City of Houston. If this Court upholds the Fifth Circuit's decision [reported at 764 F.2d 1156 (5th Cir. 1985), *aff'd on rehearing*, 789 F.2d 1103 (5th Cir. 1986)], scores of laws similar to Houston's will become subject to constitutional challenge. NIMLO and its member local governments are concerned that municipalities will then be unable to adequately protect the security of their police officers and the public.

NIMLO has compiled material which is a matter of public record but which is not otherwise available to the Court in its collected form. First, we have set forth in the brief and Appendices citations to laws which are similar in substance to the Houston ordinance. The ordinances and statutes listed are a small percentage of the hundreds which have been adopted by state and local governments throughout the country to protect police officers in the lawful performance of their duties. Secondly, we are providing statistics compiled by the Federal Bureau of Investigation (FBI) on the number of law enforcement officers assaulted and killed in the line of duty, especially investigations. These statistics will shed light on the need for laws which protect law enforcement officers from obstruction and interference. We believe it is important for the Court to have access to this material in considering this case.

To ensure that the Court is fully made aware of the gravity of this case, NIMLO has prepared the accompanying brief. We regret elements beyond our control prevented the filing of this brief on time.

WHEREFORE, NIMLO respectfully moves for leave to file out of time the attached brief as amicus curiae.

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RAYMOND WAYNE HILL,
Appellee,

On Appeal from the United States Court
of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The interest of the amicus curiae is set forth in the foregoing motion for leave to file this brief and herein amplified.

STATEMENT OF THE CASE

Amicus adopts the statement of the case as presented by Appellant City of Houston but wishes to emphasize those facts that prompts particular nationwide local government concern.

While patroling with his partner on February 14, 1982, Houston police officer J.L. Kelley observed Charles Hill standing in the middle of a busy intersection disrupting and impeding the flow of traffic. (J.A. at 51-52) This activity occurred late in the evening in an area of Houston which experiences a large amount of pedestrian and vehicular traffic at that time of night. After Officer Kelley called Hill to the sidewalk, Hill began acting strangely and making peculiar noises. (J.A. at 56) The Officer had to put his hand on Hill's shoulder to keep him from wandering away. Appellee, who had been standing nearby observing the scene, then approached Officer Kelley and began to harass and challenge him. (J.A. at 57) In a loud boisterous voice the Appellee demanded that Kelley leave Hill alone and pick on someone his own size. By now a crowd of up to 25 persons had formed near Officer Kelley who, as he later testified, feared that Appellee was attempting to incite the crowd. (J.A. at 61, 75) Kelley asked Appellee whether he was interrupting him in his official capacity as a police officer and Appellee responded, "Yes. Why don't you pick on somebody my size?" (J.A. at 15) Afraid that Appellee's provocative challenge would lead to violence — a conclusion drawn from the crowd's apparent support of Appellee — Officer Kelley arrested and charged Appellee under the Houston ordinance for interfering with his investigation. (J.A. at 58)

Appellee testified he is an experienced and sophisticated political activist. (J.A. 5-6) He testified that he is director of the Houston Human Rights League, an organization devoted to, in Appellee's own words, "protect[ing] people from abuses of public officials like police." (J.A. at 31) He is also a talk-show host on a radio station which he helped found, and a Board Member of the Gay Political Caucus, another organization he helped start. He is knowledgeable

about the law as well, and is employed as a paralegal in a Houston law firm. (J.A. at 5)

The record also reflects that the Appellee's arrest in the present case was no chance event. Appellee has been arrested four times for violating the Houston ordinance; twice before and once after the arrest from which this case arose. (J.A. at 7-11) Appellee testified that since 1975 he has made a practice of deliberately confronting Houston police officers in the performance of their duties because of what he believed to be police harassment of homosexuals. (J.A. at 11) Appellee's 1977 arrest under the Houston ordinance is a typical example of his conduct towards the Houston police. (J.A. at 11) In that case he entered a bookstore in which the police suspected criminal activity and used the public address system to disclose the presence of undercover police conducting an investigation. Appellee also admitted that he is a friend of Charles Hill (J.A. at 13), the man detained by Officer Kelley for impeding traffic. It was during Kelley's questioning of Hill that Appellee seized the opportunity to interfere with the investigating officer. Appellee freely admitted that he intentionally interrupted and interfered with Kelley's investigation of Hill and he indicated he would do the same thing again. (J.A. at 29)

SUMMARY OF ARGUMENT

Law enforcement is perhaps the most vital interest of government. For law enforcement to be effective, police officers must be allowed to conduct investigations, make arrests and perform their other law enforcement responsibilities free from intentional interference and obstruction. Such conduct creates a threat to both public and police safety. The City of Houston acted well within consti-

tutional bounds in prohibiting interference with police officers in the performance of their duties.

Hundreds of municipalities, as well as virtually every state and the Federal Government, have laws similar in substance to the City of Houston ordinance at issue here. If the Houston ordinance is found unconstitutional, these laws will be subject to legal challenge. This will severely impair the ability of government to adequately provide for the safety of the public and law enforcement personnel.

The need for laws like the Houston ordinance is amply demonstrated in a recent report by the Federal Bureau of Investigation. The FBI statistics reveal the tragically high number of federal, state and local law enforcement officers assaulted and killed in the line of duty. A substantial percentage of these officers were attacked while conducting investigations or attempting to make arrests, *infra* 12-13. Obstructing a police officer during an investigation or arrest poses an unacceptable threat to public safety. There is nothing in the Constitution that prevents governments at the federal, state and local level from prohibiting such conduct.

There is also nothing in the Constitution that prevents police officers from protecting themselves from unwarranted interference. In this case the police acted responsibly and professionally by arresting Appellee before his conduct led to violence. Their actions deserve praise, not scorn, or overbroad extension of the "overbroad" doctrine.

The Houston ordinance does not deter or prevent anyone from engaging in conduct protected under the First Amendment. The potential sweep of the ordinance does not limit or chill the free expression of ideas. The ordinance simply prohibits criminal conduct which threatens

the safety of both police officers and civilians. For these reasons, the contention that the ordinance is overbroad is completely without merit. Even assuming that the ordinance is overbroad, there are a number of reasonable limiting constructions which can be read into the ordinance that will obviate the need to invalidate the ordinance for overbreadth.

ARGUMENT

I. THE HOUSTON ORDINANCE IS A LAWFUL MEANS OF REGULATING CONSTITUTIONALLY UNPROTECTED CRIMINAL CONDUCT WHICH THREATENS THE SAFETY OF LAW ENFORCEMENT OFFICERS AND THE PUBLIC.

Municipal and state governments exist to protect people from the actions of lawbreakers which endanger the public's safety within their jurisdiction. A legitimate method of accomplishing this goal is through laws which make it a crime to interfere with police or other law enforcement officers engaged in the performance of their investigatory duties. These laws satisfy the governmental obligation of maintaining safety and protecting law enforcement personnel during the tense atmosphere inherent in the questioning and arresting of alleged criminals. This Court recognized the strong government interest in law enforcement in *Colten v. Kentucky,* 407 U.S. 104 (1972), a case similar to the one at bar. There the Court affirmed a conviction under a disorderly conduct statute and dismissed the defendant's claims of First Amendment protection. The Court held that "the State has a legitimate interest in enforcing its traffic laws and its officers were entitled to enforce them free from possible interference or interruption from bystanders, even those claiming a third-party interest in the transaction." *Id.* at 109.

The City of Houston has attempted to serve the legitimate public interest in law enforcment by enacting an ordinance which protects the physical safety of its police officers. The ordinance provides:

> **"§34-11. Assaulting or interfering with policemen.**
>
> (a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest."[1]

Conduct which interferes with or obstructs law enforcement officers in the performance of their duties poses a distinct threat to public safety. Whatever First Amendment protection such conduct may claim, the right to speak is not absolute and may be regulated if the regulation is within the constitutional powers of the government, if it furthers a significant governmental interest, if it is not based on the content of speech, and if it leaves open alternative forums for communication. *See Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 297-99 (1984); *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640, 647-48 (1981) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 771 (1976)); *United States v. O'Brien,* 391 U.S. 367, 377 (1968).

Viewed against this standard, the Houston ordinance is clearly a constitutional regulation as applied to Appellee's conduct. First, the municipal police power is unquestionably broad enough to encompass an ordinance prohibiting interference with a police officer during the lawful performance of an officer's public safety duties. *See Berman v.*

[1]Houston, Texas Code of Ordinances § 34-11(a) (1968).

Parker, 348 U.S. 26, 32-33 (1954); *Noble State Bank v. Haskell,* 219 U.S. 104, 111 (1911).[2] Second. the ordinance is not aimed at forbidding or suppressing a particular message. It is content-neutral, regulating speech only to the extent that it obstructs police officers attempting to discharge their duties. Appellee's "speech" was admittedly intended to effectuate the unlawful act of interfering with a police officer engaged in an investigation. That Appellee's criminal conduct reasonably believed to be escalating into potential violence (J.A. at 80), had a verbal element "does not bring with it constitutional protection." *Cox v. Louisiana,* 379 U.S. 559, 564 (1965); *See also Giboney v. Empire Storage and Ice Co.,* 336 U.S. 490, 502 (1949).

And finally, the ordinance has been narrowly drawn to serve the important governmental interest in law enforcement. The ordinance prohibits obstruction of police officers in the law enforcement context of arrests and investigations where such disruptive conduct creates unwarranted danger. But it does not deter or prevent the Appellee or anyone else from voicing opposition to the actions or performance of the Houston Police Department. Such constitutionally protected speech is beyond the ordinance's reach.

II. PROTECTING THE SAFETY OF LAW ENFORCEMENT OFFICERS AND THE PUBLIC IS A FUNDAMENTAL RESPONSIBILITY OF GOVERNMENT.

Law enforcement officers are an integral part of a legal system designed to control deviant behavior and maintain order. As a result, unprecedented demands are now made

[2]*See generally* 6 E. McQuillin, The Law Of Municipal Corporations §§ 24.09, 24.12, 24.98 (rev. 3d ed. 1980); Rhyne, The Law Of Local Government Operations §§ 19.1-19.3 (1980).

on these officers. They are routinely asked to conduct investigations, apprehend criminals, make arrests, keep the peace, resolve disputes, rescue those in danger of physical harm and, in general, act as instruments of public safety.

The dangers which are inherent to police work increase exponentially when police officers are obstructed while attempting to carry out their law enforcement responsibilities. It is both the right and obligation of government to protect its law enforcement officers from interference which jeopardizes their safety. Notwithstanding Appellee's assertions to the contrary (Appellee's Br. p. 21), the Federal Government and a vast number of state and local governments have laws which proscribe the very kind of conduct for which Appellee was arrested. Examples of these are quoted in this brief *infra,* and in the Appendices.

A. If This Court Finds The Houston Ordinance Unconstitutional, Hundreds Of Similar Federal, State, And Local Laws Will Be Subject To Constitutional Challenge And The Ability Of Government To Protect Its Law Enforcement Officers And The Public Will Be Severely Undermined.

Appellee contends that his conduct would not have subjected him to arrest in any one of the 1145 Texas cities "nor in all probability, anywhere else in the country." (Appellee's Br. p. 21). This, he concludes, demonstrates the unconstitutional sweep of the Houston ordinance. Appellee's premise and conclusion are equally unfounded. Beginning at the local level, just a partial survey of NIMLO's extensive library of city codes and that of the Texas Municipal League has revealed many ordinances similar in substance to the Houston ordinance. See Appendices B & C.

For example, Appellee surely could have been arrested in Kansas City, Missouri where it is a misdemeanor to "in any way or manner hinder, obstruct, molest, resist or otherwise interfere with any . . . member of the police force in the discharge of his official duties."[3] His conduct would also have led to arrest in Salt Lake City, Utah where "every person who knowingly and willfully challenges to fight, assaults, strikes, verbally abuses, interferes with, resists, molests or threatens any police officer . . . in the discharge of his official duties is guilty of misdemeanor."[4]

In addition to the laws of cities and towns throughout the Nation, federal law and the laws of virtually every state also prohibit interference with a law enforcement officer. The applicable federal statute imposes a substantial penalty on "whoever forcibly assaults, impedes, resists, opposes, intimidates or interferes with any [federal law enforcement officer] while engaged in . . . the performance of his official duties . . ."[5] As for the states, Utah's law is typical; it prohibits anyone from using "force, violence, intimidation, or engag[ing] in any other unlawful act with a purpose to interfere with a public servant performing . . . an official function."[6]

The existence of "police interference" laws like Houston's in such great numbers and at every level of government indicates the critical role these laws play in pro-

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[3]Kansas City, Mo., Code of Gen. Ordinances §26.35 (1976) (See Appendix B for full text).

[4]Salt Lake City, Utah Rev. Ordinances § 32-1-5 (1975) (See Appendix B for full text). Other ordinances substantially similar to Houston's are set forth in Appendices B and C as samples of the hundreds which exist.

[5]18 U.S.C. § 111 (1982).

[6]Utah Code Ann. § 76-8-301 (1982). Other state laws are set forth in Appendix A.

tecting the public safety and that of law enforcement officers.[7] If this Court finds the Houston ordinance unconstitutional, many of these laws will be subject to constitutional challenge. Unfortunately, this will impede, if not paralyze, the ability of government at the federal, state and local level to adequately provide for the safety of the public and of law enforcement officers. To appreciate the impact this will have it is helpful to study an objective, factual FBI report on the very real dangers police face while on the job.[8]

B. Federal, State, And Local Law Enforcemnt Officers Face A Great Risk Of Assault And Injury While Investigating Alleged Crime.

Law enforcement is a perilous profession calling for extensive training, skill, judgment, and courage. In their day-to-day work, thousands of federal, state, and local law enforcement officers encounter situations in which the threat of injury or death is genuine. There are few vocations which have the need to record the deliberate assaults and murders committed against their membership; law enforcement is, unfortunately, one of them. A recent study prepared by the FBI presents grim statistical information on the disturbingly high number of police officers assaulted and killed in the line of duty. This report sheds light on the need for laws which offer law enforcement officers some measure of protection from interference and obstruction which may be life threatening.

[7]Appellee testified that since 1975 he has intentionally harassed Houston police. (J.A. at 11) Here, Appellee was arrested under circumstances he created. The purpose of the police was to "defuse" a situation believed to be "escalating into violence," threatening injury to police, those in their custody and others present. (J.A. at 74-80)

[8]FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED (1986).

Regrettably, the odds are too high that a police or other law enforcement officer will be assaulted and injured on the job while attempting to perform his or her duties. 61,724 state and local law enforcement officers were victims of assault in 1985 (16 out of every 100 officers) and 34% of those were injured as a result.[9] In total, for the years 1981 through 1985, close to 300,000 state and local law enforcement officers were assaulted and 33% suffered injury.[10] Though less in number than their state and local counterparts, federal law enforcement officers also face the very real threat of assault and injury. From 1981 through 1985, assaults on 3,500 federal law officers led to 456 injuries.[11] Altogether, 413 federal, state, and local law enforcement officers were killed in that five-year period.[12] Significantly, the FBI study reveals that a great number of assaults occur while law enforcement officers are investigating suspicious persons or circumstances. According to the study, almost 5,000 state and local officers were assaulted in 1985 during such investigations.[13] More federal officers (68%) were assaulted while conducting investigations or searches in 1985 than while engaged in any other activity.[14]

As the Joint Appendix makes clear, Houston Police Officer Kelley was conducting an investigation of a "suspicious person" (Charles Hill) when Appellee began inten-

[9]*Id.* at 47.
[10]*Id.* at 47.
[11]*Id.* at 54.
[12]*Id.* at 18.
[13]*Id.* at 45.
[14]*Id.* at 50.

tionally obstructing that investigation. As Kelley later testified, the Appellee was standing in the midst of a large crowd which had massed behind Appellee near the Officer when he began demanding in a "very loud, very strong voice" that Officer Kelley leave Charles Hill alone and "pick on someone [his] own size." (J.A. at 70-72). The Officer found Appellee's conduct to be threatening and dangerous. He testified that his "biggest concern was [Appellee] inciting this crowd against me and my partner. . . I had to focus my attention on Mr. Hill [Appellee] and to alleviate the possibility of violence." (J.A. at 75).

Considering the potentially explosive nature of this incident, and in light of what the FBI study reveals about the dangers inherent in an investigatory situation, Officer Kelley's fear of impending violence was clearly reasonable and prudent. We ask the Court to consider what might have been the outcome if, instead of a traffic violation, Kelley had been investigating a possible felony. We agree with the dissenting opinion below that "the Constitution does not require an officer to adopt a 'wait and see' attitude when threats interrupt an investigation or arrest." *Hill v. City of Houston,* 764 F.2d 1156, 1168 (5th Cir. 1985) (Higginbotham, J., dissenting), *aff'd on rehearing,* 789 F.2d 1103 (5th Cir. 1986). The Houston ordinance, and hundreds of laws like it, are a necessary and effective means of ensuring that criminal interference with law enforcement does not add to the burdens already weighing dangerously on law enforcement officers.

C. The Careful And Compassionate Action Of The Police Here Demonstrates Law Enforcement At Its Best And Should Not Be The Basis For Declaring The Ordinance Unconstitutional.

In recent years, respect for the police in America's municipalities has been eroding, changing into an attitude of indiferrence, resentment, and as is shown here, outright obstructionism. In some instances police abuses justified the less than friendly relationship between the law enforcement community and local citizens. However, when police act as they did here, in full accordance with the Constitution, with the utmost of politeness, civility and understanding, they should be rewarded with commendations, not condemnation.

A review of the pertinent facts demonstrates the police reacted to the tense and unpredictable situation they were confronted with in a professional and courteous manner. Officer Kelley quickly led Charles Hill from the middle of the street, where he was illegally directing traffic, and began questioning him at a distance from the growing crowd. This questioning was done in as calm a manner as possible given the pressures associated with having to conduct a criminal investigation late at night at a heavily traveled street. Significantly adding to these pressures was the Appellee, who began to challenge and taunt Officer Kelley in hopes of causing a disruption, drawing a crowd, and inciting interfering activity by others. Appellee admits he was baiting police officers to arrest him.

The police here correctly assessed that they and the public were in greater danger from Appellee and his conduct than from the individual they had been questioning. In fact, the police finally decided to let Charles Hill proceed on his way in order to respond to the danger presented by Appellee and the crowd gathering around him.

In this case, the Houston police demonstrated the professional training they had received and took the appropriate steps to defuse an explosive situation. They properly arrested the Appellee and took him into custody, removing him from the crowd he was inciting.

The FBI study discussed in Section IIB of the Argument in this brief poignantly demonstrates that any concerns of the Houston police officers for the health and safety of themselves, persons in their custody for whom they were responsible and bystanders were well founded. The police acted properly in meeting those concerns by arresting the Appellee. Had Houston not adopted the ordinance at issue here, the officers would have been severely hampered in attempting to control the situation they were facing. Additionally, if the Houston police were not able to arrest the Appellee for his conduct, subsequent attempts to make arrests in the midst of crowds in that area of Houston would have been met with harassing and obstructionist tactics, if not by Appellee then by others who share his desire to interfere with police carrying out their investigatory duty. Without an arrest of Appellee, the community might conclude that Appellee's disruptive conduct was the reason Charles Hill was allowed to go free. Appellee would have claimed a victory over the Houston police and spread the news of his conquest over his radio talk show, much to the detriment of future peaceful law enforcement.

The police acted properly here to keep the peace during the episode and to ensure they will be able to control future similar occurrences. Police action in strict compliance with Houston's laws should not be the basis for removing the protection provided by the ordinance to law enforcement personnel and the public while doing their difficult public duty.

III. THE HOUSTON ORDINANCE IS NOT UNCONSTITUTIONALLY OVERBROAD.

It is a settled rule of standing that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499 (1975). When a law is challenged on grounds that it is unconstitutionally overbroad, a limited exception to that general rule of standing is recognized. Plaintiffs may challenge a statute as overbroad "not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973). *See also Secretary of State of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947 (1984); *Dombrowski v. Pfister,* 380 U.S. 479, 486-87 (1965).

This Court has been properly concerned that this exception to the general standing requirement would result in unnecessary federal court interference with state and local law. To avoid such a result, the efficacy of the overbreadth doctrine as a means of invalidating statutes *in toto* has been significantly diminished by this Court. A statute may not be invalidated as unconstitutionally overbroad unless its chilling effect on protected expression "[is] not only . . . real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick,* 413 U.S. at 615 (emphasis added); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975). In other words, a facial challenge must fail if the challenged law does not "[reach] a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494 (1982).

Appellee claims the Houston ordinance is unconstitutionally overbroad and has imagined situations in which innocent activity may fall within its reach. It is submitted that such reasoning should not be dispositive of the overbreadth issue. This Court has never held that a law is substantially overbroad merely because it is possible to fashion hypothetical cases where the law would have an unconstitutional impact. The Court has in fact held to the contrary:

> [T]he mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge. [T]here must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 800-01 (1984).

The potential sweep of the Houston ordinance does not limit or chill in any *substantial* way the free expression of ideas. That is neither its goal nor its effect. It simply protects police officers already burdened by the dangers inherent in police work from the additional dangers created by conduct which constitutes interference, obstruction and provocation to violence. The ordinance is clearly directed at intentional criminal conduct. It "reflect[s] legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct." *Broadrick*, 413 U.S. at 615. Such conduct, which implicitly carries with it the threat of physical danger to police officers and civilians, does not rise to the level of conduct protected by the First Amendment.

The application of the overbreadth doctrine is "manifestly strong medicine" to be applied "sparingly" and "as a last resort." *Broadrick*, 413 U.S. at 613. As this Court has acknowledged, "even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct." *Parker v. Levy*, 417 U.S. 733, 760 (1974), *quoted in New York v. Ferber*, 458 U.S. 747, 771 n.25 (1982). Here, the alleged impermissible applications of the Houston ordinance represent only a small fraction of the conduct legitimately within the ordinance's reach. Thus, any imagined overbreadth should not be considered substantial. The Houston ordinance quoted in Appendix C at pg. 38a contains an additional section which amplifies the legislative intent in the area of interference with law enforcement officers. While neither party has referred to §(b) of the Houston ordinance it may be an interpretation of facts to consider under *Parker* and *Ferber*.

Appellee's characterization of the ordinance as overbroad fails to recognize that few of our criminal laws would survive judicial scrutiny if they could be stricken because of a remote possibility that they might, as applied to an unusual set of facts, reach protected conduct. The requirement that any overbreadth be substantial recognizes that it is inappropriate for a court to invalidate a criminal law because of dubious speculation about its effect on hypothetical cases when, as in the present case, the challenged law reaches a broad range of constitutionally proscribable conduct. As this Court has stated:

> Although . . . laws, if too broadly worded, may deter protected speech to some unknown extent,

> there comes a point where that effect — at best a prediction — cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe.

Broadrick, 413 U.S. at 615.

The City of Houston, in the valid exercise of its municipal police powers, has attempted to regulate the variety of disruptive, constitutionally unprotected conduct that may impede police officers in the performance of their duties. The imagined unlawful applications of the Houston ordinance are insignificant in comparison with the vast amount of conduct within its legitimate reach. For these reasons, Appellee's claim that the ordinance is substantially overbroad must fail.

IV. EVEN ASSUMING THAT THE HOUSTON ORDINANCE IS OVERBROAD, IN THE ABSENCE OF A STATE COURT CONSTRUCTION A FEDERAL COURT SHOULD NOT INVALIDATE AN ORDINANCE ON THE BASIS OF OVERBREADTH WHEN REASONABLE LIMITING CONSTRUCTIONS ARE AVAILABLE.

The overbreadth doctrine may not be used to strike down a law *in toto* if "a limiting construction has been or could be placed on the challenged statute." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Though no Texas court has ruled on the validity of the Houston ordinance, under *Broadrick* a federal court may uphold the ordinance in the face of an overbreadth attack if reasonable limiting constructions are available. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 60 (1976).

Assuming *arguendo* that the Houston ordinance does impermissibly impinge on constitutionally protected activity, it is easily susceptible to suitable limiting constructions. We urge this Court to adopt the reasoning of the dissenting opinion below which states that courts may cure alleged constitutional infirmities in the ordinance by implying an intent requirement and limiting the sweep of the ordinance to interference with *lawful* police actions related to arrests and detentions. *Hill v. City of Houston*, 764 F.2d 1156, 1171 (5th Cir. 1985) (Higginbotham, J., dissenting), *aff'd on rehearing*, 789 F.2d 1103 (5th Cir. 1986).[15]

Insignificant interruptions and legitimate protests of police actions fall outside the purview of the Houston ordinance. Limiting constructions would alleviate the unjustified concerns that the ordinance proscribes constitutionally protected conduct. With such constructions available, this Court need not take the extraordinary step of finding the ordinance fatally overbroad.

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[15]Reading an intent requirement into the Houston ordinance is not, strictly speaking, a limiting construction. Appellee admitted his conduct was intended. (J.A. at 19) Under Texas law intent is a necessary element of all Texas criminal statutes and ordinances. *See* Tex. Penal Code Ann. § 602 (Vernon 1974); Appellant's Br. p. ix.

CONCLUSION

For the foregoing reasons, it is urged that this Court reverse the decision of the Fifth Circuit Court of Appeals and uphold the Appellant City of Houston's ordinance as a constitutionally valid criminal conduct regulation serving an important local government interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Jan Majewski, attorney for amicus, certifies that on February 13, 1987, he caused a copy of the foregoing brief to be delivered to Jerry Edwin Smith, City Attorney; Roy Forrest Martin, III, Senior Assistant City Attorney; Robert J. Collins, Senior Assistant City Attorney; and Mark F. Elvig, Assistant City Attorney, Counsel for Appellant, City of Houston, Legal Department, P.O. Box 1562, Houston, Texas 77251. A copy of the foregoing brief was also delivered to Charles Alan Wright, 727 East 26th Street, Austin, Texas 78705; Michael A. Maness, 1900 North Loop West Suite 500, Houston, Texas 77018; and Gerald M. Birnberg, 6671 Southwest Freeway, Suite 303, Houston, Texas 77074, Counsel for Appellee.

The brief was delivered by placing said brief in the United States Postal Service mail addressed to each of said counsel with required postage affixed thereon.

Jan Majewski
JAN MAJEWSKI

APPENDIX A

STATE STATUTES

Ala. Code § 13A-10-41 (1975).

§13A-10-41. Resisting arrest.

(a) A person commits the crime of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from affecting a lawful arrest of himself or of another person.

(b) Resisting arrest is a Class B misdemeanor.

Alaska Stat. § 11.56.700 (1983).

Sec. 11.56.700. Resisting or interfering with arrest. (a) A person commits the crime of resisting or interfering with arrest if, knowing that a peace officer is making an arrest, with the intent of preventing the officer from making the arrest, the person resists personal arrest or interferes with the arrest of another by

(1) force;

(2) committing any degree of criminal mischief; or

(3) any means that creates a substantial risk of physical injury to any person.

(b) Resisting or interfering with arrest is a class A misdemeanor.

Ariz. Rev. Stat. Ann § 13-2508 (Supp. 1986).

§ 13-2508. Resisting arrest; classification

A. A person commits resisting arrest by intentionally preventing or attempting to prevent a person reasonably known to him to be a peace officer, acting under color of such peace officer's official authority, from effecting an arrest by:

1. Using or threatening to use physical force against the peace officer or another; or

2. Using any other means creating a substantial risk of causing physical injury to the peace officer or another.

B. Resisting arrest is a class 6 felony.

Ark. Stat. Ann. § 41-2802 (1977).

§ 41-2802. Obstructing governmental operations. – (1) A person commits the offense of obstructing governmental operations if he knowingly obstructs, impairs, or hinders the performance of any governmental function.

(2) Obstructing governmental operations by using or threatening to use physical force is a class A misdemeanor. Otherwise obstructing governmental operations is a class C misdemeanor.

(3) This section shall not apply to:

(a) unlawful flight by a person charged with an offense; or

(b) refusal to submit to arrest; or

(c) any means of avoiding compliance with the law not involving affirmative interference with governmental functions; or

(d) the obstruction, impairment or hinderance of unlawful action by a public servant.

Cal. Penal Code §148 (Deering 1985).

§ 148. [Resisting public officer in discharge of duties]

Every person who willfully resists, delays, or obstructs any public officer or peace officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.

Colo. Rev. Stat. § 18-8-104 (1986).

§ 18-8-104. Obstructing a peace officer or fireman. (1) A person commits obstructing a peace officer or fireman when, by using or threatening to use violence, force, or physical interference, or obstacle, he knowingly obstructs, impairs, or hinders the enforcement of the penal law or the preservation of the peace by a peace officer, acting under color of his official authority, or knowingly obstructs, impairs, or hinders the prevention, control, or abatement of fire by a fireman, acting under color of his official authority.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, if he was acting under color of his official authority as defined in section 18-8-103(2).

(3) Repealed. L. 83, p. 671, § 23, effective July 1, 1983.

(4) Obstructing a peace officer or fireman is a class 2 misdemeanor.

Conn. Gen. Stat. Ann. § 53a-167a (West 1985).

§ 53a-167a. Interfering with an officer; Class A misdemeanor

(a) A person is guilty of interfering with an officer when he obstructs, resists, hinders or endangers any peace officer or fireman in the performance of his duties.

(b) Interfering with an officer is a class A misdemeanor.

Del. Code Ann. tit. 11 § 1257 (1979)

§ 1257. Resisting arrest; class A misdemeanor.

A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer from effecting an arrest or detention of himself or another person or intentionally flees from a peace officer who is effecting an arrest.

Fla. Stat. Ann. § 843.02 (West Supp. 1986).

843.02. Resisting officer without violence to his person.

Whoever shall obstruct or oppose any such officer, beverage enforcement agent, weight and safety officer of the Department of Transportation, member of the Florida Parole and Probation Commission or any administrative aide or supervisor employed by said commission, parole and probation supervisor or parole and probation officer employed by the Depart-

ment of Corrections, personnel or representative of the Department of Law Enforcement, or legally authorized person in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Ga. Code Ann. 16-10-24 (Supp. 1986).

16-10-24. Obstruction or hindering of law enforcement officers.

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.

(b) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, correctional officer, probation supervisor, parole supervisor, or conservation ranger in the lawful discharge of his official duties by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

Hawaii Rev. Sat. §710-1026 (1976)

§710-1026 Resisting arrest. (1) A person commits the offense of resisting arrest if he intentionally prevents a peace officer acting under coior of his official authority from effecting an arrest by:

(a) Using or threatening to use physical force against the peace officer of another; or

(b) Using any other means creating a substantial risk of causing bodily injury to the peace officer or another.

(2) Resisting arrest is a misdemeanor.

Idaho Code §18-705 (1979)

18.705. Resisting and obstructing officers.—Every person who wilfully resists, delays or obstructs any public officer, in the discharge, or attempt to discharge, of any duty of his office, when no other punishment is prescribed, is punishable by fine not exceeding $5,000, and imprisonment in the county jail not exceeding one (1) year.

Ill. Ann. Stat. Ch.38, §31-1 (Smith-Hurd 1977)

§ 31-1. Resisting or Obstructing a Peace Officer

A person who knowingly resists or obstructs the performance by one known to the person to be a peace officer of any authorized act within his official capacity commits a Class A misdemeanor.

Ind. Code Ann. §35-44-3-3 (West Supp. 1986)

35-44-3-3 Resisting law enforcement

Sec. 3. (a) A person who knowingly or intentionally:

(1) forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of his duties as an officer;

(2) forcibly resists, obstructs, or interferes with the

authorized service or execution of a civil or criminal process or order of a court; or

(3) flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop;

commits resisting law enforcement, a Class A misdemeanor. However, the offense is a Class D felony if, while committing it, the person draws or uses a deadly weapon, inflicts bodily injury on another person, or operates a vehicle in a manner that creates a substantial risk of bodily injury to another person.

(b) For purposes of this section, a law enforcement officer includes an alcoholic beverage enforcement officer and a conservation officer of the department of natural resources.

Iowa Code Ann. §719.1 (West Supp. 1986)

719.1. Interference with official acts

A person who knowingly resists or obstructs anyone known by the person to be a peace officer or fire fighter, whether paid or volunteer, in the performance of any act which is within the scope of the lawful duty or authority of that officer or fire fighter, whether paid or volunteer, or who knowingly resists or obstructs the service or execution by any authorized person of any civil or criminal process or order of any court, commits a simple misdemeanor. However, if a person commits an interference with official acts, as defined in this section, and in so doing inflicts bodily injury other than serious injury, that person commits a serious misdemeanor. If a person commits an interference with official acts, as defined in this section, and in so doing inflicts or attempts to inflict

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serious injury, or displays a dangerous weapon, as defined in section 702.7, or is armed with a firearm, that person commits an aggravated misdemeanor. The terms "resist" and "obstruct", as used in this section, do not include verbal harassment unless the verbal harassment is accompanied by a present ability and apparent intention to execute a verbal threat physically.

Kan. Stat. Ann. §21-3808 (1981)

21-3808. Obstructing legal process or official duty. Obstructing legal process or official duty is knowingly and willfully obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in the attempt to serve or execute any writ, warrant, process or order of a court, or in the discharge of any official duty.

Obstructing legal process or official duty in a case of felony is a class E felony. Obstructing legal process or official duty in a case of misdemeanor or a civil case is a class A misdemeanor.

Ky. Rev. Stat. Ann. § 520.090 (Baldwin 1984)

520.090 Resisting arrest

(1) A person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a peace officer, recognized to be acting under color of his official authority, from effecting an arrest of the actor or another by:

(a) Using or threatening to use physical force or violence against the peace officer or another; or

(b) Using any other means creating a substantial

risk of causing physical injury to the peace officer or another.

(2) Resisting arrest is a Class A misdemeanor.

La. Rev. Stat. Ann. § 14:108 (West 1986)

§ 108. Resisting an officer

A. Resisting an officer is the intentional opposition or resistance to or obstruction of an individual acting in his official capacity and authorized by law to make a lawful arrest or seizure of property or to serve any lawful process or court order when the offender knows or has reason to know that the person arresting, seizing property, or serving process is acting in his official capacity.

B. (1) The phrase "obstruction of" as used herein shall, in addition to its common meaning, signification, and connotation mean the following:

(a) Flight by one sought to be arrested before the arresting officer can restrain him and after notice is given that he is under arrest.

(b) Any violence toward or any resistance or opposition to the arresting officer after the arrested party is actually placed under arrest and before he is incarcerated in jail.

(c) Refusal by the arrested party to give his name and make his identity known to the arresting officer.

(d) Congregation with others on a public street and refusal to move on when ordered by the officer.

(2) The word "officer" as used herein shall include deputy sheriffs and municipal police officers.

C. Whoever commits the crime of resisting an officer shall be fined not more than five hundred dollars or be imprisoned for not more than six months, or both.

Me. Rev. Stat. Ann. tit. 17-A, §751 (1983)

§ 751. Obstructing government administration

1. A person is guilty of obstructing government administration if he uses force, violence, intimidation or engages in any criminal act with the intent to interfere with a public servant performing or purporting to perform an official function.

2. This section shall not apply to:

A. Refusal by a person to submit to an arrest;

B. Escape by a person from official custody, as defined in section 755.

3. Obstructing government administration is a Class D crime.

Mich. Comp. Laws Ann. §750.479 (West 1968)

§28.747] Resisting, etc., officer in discharge of duty. SEC. 479. Any person who shall knowingly and wilfully obstruct, resist or oppose any sheriff, coroner, township teasurer, constable or other officer or person duly authorized, in serving, or attempting to serve or execute any process, rule or order made or issued by lawful authority, or who shall resist any officer in the execution of an ordinance, by law, or any rule, order or resolution made, issued, or passed by the common council of any city board of trustees, or common council or village council of any incorporated village, or township board of any township or who shall assault, beat or wound any sheriff, coroner, township treasurer, constable or other officer duly authorized, while serving, or attempting to serve or execute any such process, rule or order, or for having served, or attempted to serve or execute the same, or who shall so obstruct, resist, oppose, assault, beat or wound any of the above named officers, or any other person or persons authorized by law to maintain and preserve the peace, in their lawful acts, attempts and efforts to maintain, preserve and keep the peace, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison not more than two [2] years, or by a fine of not more than one thousand [1,000] dollars.

Minn. Stat. Ann. §609.50 (West 1964)

609.50 Obstructing legal process or arrest

Whoever intentionally obstructs, hinders or prevents the lawful execution of any legal process, civil or criminal, or apprehension of another on a charge or conviction of a criminal offense may be sentenced as follows:

(1) If the act was accompanied by force or violence or the threat thereof, to imprisonment for not more than one year or to payment of a fine of not more than $1,000, or both; or

(2) In other cases to imprisonment for not more than 90 days or to payment of a fine of not more than $100.

Miss. Code Ann. § 97-9-73 (1972)

§ 97-9-73. Resisting or obstructing arrest

It shall be unlawful for any person to obstruct or resist by force, or violence, or threats, or in any other manner, his lawful arrest or the lawful arrest of another person by any sheriff or deputy sheriff of any county, or any municipal policeman, or any constable, or by any other law enforcement officer of the State of Mississippi, or of any county or municipality thereof, and any person or persons so doing shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than five hundred dollars ($500.00), or by imprisonment in the county jail not more than six months, or both.

Mo. Ann. Stat. § 575.150 (Vernon 1979)

575.150. Resisting or interfering with arrest

1. A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, for the purpose of preventing the officer from effecting the arrest, he:

(1) Resists the arrest of himself by using or threatening the use of violence or physical force or by fleeing from such officer; or

(2) Interferes with the arrest of another person by using or threatenting the use of violence, physical force or physical interference.

2. This section applies to arrests with or without warrants and to arrests for any crime or ordinance violation.

3. It is no defense to a prosecution under subsection

1 of this section that the law enforcement officer was acting unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

4. Resisting, by means other than flight, or interfering with an arrest for a felony is a class D felony; otherwise, resisting or interfering with arrest is a class A misdemeanor.

Mont. Code Ann. §45-7-302 (1985)

45-7-302. Obstructing a peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if he knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant shall be fined not to exeed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

Neb. Rev. Sat. §28-906 (1985)

28-906. Obstructing a peace officer; penalty. (1) A person commits the offense of obstructing a peace officer, when, by using or threatening to use violence, force, physical interference, or obstacle, he intentionally obstructs, impairs, or hinders the enforce-

ment of the penal law or the preservation of the peace by a peace officer or judge acting under color of his official authority.

(2) Obstructing a peace officer is a Class I misdemeanor.

Nev. Rev. Stat. §199.280 (1985)

199.280. Resisting public officer.

Every person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:

1. Where a dangerous weapon is used in the course of such resistance, obstruction or delay, by imprisonment in the state prison for not less than 1 year nor more than 6 years, and may be further punished by a fine of not more than $5,000.

2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

N.H. Rev. Sat. Ann. §642:1 (1986)

642:1 Obstructing Government Administration. A person is guilty of a misdemeanor if he uses force, violence, intimidation or engages in any other unlawful act with a purpose to interfere with a public servant, as defined in RSA 640:2, II, performing or purporting to perform an official function; provided, however, that flight by a person charged with an offense, refusal by anyone to submit to arrest or any such interference in connection with a labor dispute with the government shall be prosecuted under the

statutes governing such matters and not under this section.

N.J. Stat. Ann. §2C:29-1 (West 1982)

2C:29-1. Obstructing administration of law or governmental function

A person commits a disorderly persons offense if he purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act. This section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

N.M. Stat. Ann. §30-22-1 (1984)

30-22-1. Resisting, evading or obstructing an officer.

Resisting, evading or obstructing an officer consists of:

A. Knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process;

B. intentionally fleeing, attempting to evade or evading an officer of this state when the person committing the act of fleeing, attempting to evade or eva-

sion has knowledge that the officer is attempting to apprehend or arrest him;

C. willfully refusing to bring a vehicle to a stop when given a visual or audible signal to stop, whe ther by hand, voice, emergency light, flashing light, siren or other signal, by a uniformed officer in an appropriately marked police vehicle; or

D. resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties.

Whoever commits resisting, evading or obstructing an officer is guilty of a misdemeanor.

N.Y. Penal Law §195.05 (McKinney Supp. 1987)

§ 195.05 Obstructing governmental administration in the second degree

A person is guilty of obstructing governmental administration when he intentionally obstructs, impairs of perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from performing an official function, by means of intimidation, physical force or interference, or by means of any independently unlawful act, or by means of interfering, whether or not physical force is involved, with radio, telephone, television or other telecommunications systems owned or operated by the state, or a county, city, town, village, fire district or emergency medical service.

Obstructing governmental administration is a class A misdemeanor.

N.C. Gen. Stat. §14-223 (1986)

§ 14-223. Resisting officers.

If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

N.D. Cent. Code §12.1-08-01 (1985)

12.1-08-01. Physical obstruction of government function.

1. A person is guilty of a class A misdemeanor if he intentionally obstructs, impairs, impedes, hinders, prevents, or perverts the administration of law or other governmental function.

2. This section does not apply to the conduct of a person obstructing arrest of himself, but such conduct is subject to section 12.1-08-02. This section does apply to the conduct of a person obstructing arrest of another. Inapplicability under this subsection is a defense.

3. It is a defense to a prosecution under this section that the administration of law or other government function was not lawful, but it is no defense that the defendant mistakenly believed that the administration of law or other government function was not lawful. For the purposes of this subsection, the conduct of a public servant acting in good faith and under color of law in the execution of a warrant or other process for arrest or search and seizure shall be deemed lawful.

Ohio Rev. Code Ann. §2921.31 (Page 1982)

§ 2921.31 Obstructing official business.

(A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(B) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Okla. Stat. Ann. tit. 21, §540 (West 1983)

§ 540. Obstructing officer

Every person who willfully delays or obstructs any public officer in the discharge or attempt to discharge any duty of his office, is guilty of a misdemeanor.

Or. Rev. Stat. §162.235 (1985)

162.235 Obstructing governmental or judicial administration. (1) A person commits the crime of obstructing governmental or judicial administration if the person intentionally obstructs, impairs or hinders the administration of law or other governmental or judicial function by means of intimidation, force, physical or economic interference or obstacle.

(2) This section shall not apply to the obstruction of unlawful governmental or judicial action or interference with the making of an arrest.

(3) Obstructing governmental or judicial administration is a Class A misdemeanor.

18 Pa. Cons. Stat. Ann. § 101 (Purdon 1983)

§ 5101. Obstructing administration of law or other other governmental function

A person commits a misdemeanor of the second degree if he intentionally obstructs, impairs or perverts the administration of law or other governmental function by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

R.I. Gen. Laws §11-32-1 (1981)

11-32-1. Obstructing officer in execution of duty. – Every person who shall obstruct any officer, civil, military, or otherwise, including any state, city or town police, sheriff or fireman, while in the execution of his office or duty, shall be imprisoned not exceeding one (1) year or be fined not exceeding five hundred dollars ($500).

S.D. Codified Laws Ann. §22-11-6 (1979)

22-11-6. Obstructing law enforcement officer, jailer or firefighter as misdemeanor. Except as provided in §§ 22-11-4 and 22-11-5, any person who, by threatening to use violence, force or physical interference or obstacle, intentionally obstructs, impairs or hinders the enforcement of the criminal laws or the preservation of the peace by a law enforcement officer or jailer acting under color of his official

authority, or intentionally obstructs, impairs or hinders the prevention, control or abatement of fire by a fire fighter acting under color of his official authority, is guilty of obstructing a law enforcement officer or jailer or firefighter. Obstructing a law enforcement officer, jailer or firefighter is a Class 1 misdemeanor.

Tenn. Code Ann. §39-5-502 (1982)

39-5-502. Resisting officer serving process — Misdemeanor. — Any person who knowingly and willfully opposes or resists an officer of the state, or other authorized person, in serving, or attempting to serve or execute, any legal writ or process, shall be guilty of a misdemeanor.

Tex. Penal Code Ann. §38.03 (Vernon 1974)

§ 38.03. Resisting Arrest or Search

(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest or search of the actor or another by using force against the peace officer or another.

(b) It is no defense to prosecution under this section that the arrest or search was unlawful.

(c) Except as provided in Subsection (d) of this section, an offense under this section is a Class A misdemeanor.

(d) An offense under this section is a felony of the third degree if the actor uses a deadly weapon to resist the arrest or search.

Utah Code Ann. §76-8-301 (1982)

76-8-301. Interference with public servant. — A person is guilty of a class B misdemeanor if he uses force, violence, intimidation, or engages in any other unlawful act with a purpose to interfere with a public servant performing or purporting to perform an official function.

Vt. Stat. Ann. tit. 13, §3001 (1986)

§ 3001. Impeding public officers

A person who hinders an executive, judicial, law enforcement, civil or military officer acting under the authority of this state or any subdivision thereof shall be imprisoned not more than three years or fined not more than $500.00, or both. — Amended 1979, No. 111 (Adj. Sess.), eff. April 10, 1980.

Va. Code §18.2-460 (Supp. 1986)

§ 18.2-460. Obstructing justice by threats or force. — A. If any person, by threats, or force, knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law-enforcement officer, lawfully engaged in his duties as such, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a Class 1 misdemeanor.

B. If any person by threats of bodily harm or force knowingly attempts to initimidate or impede a judge, magistrate, justice, juror, witness, or any law enforcement officer, lawfully engaged in the discharge of his duty, or to obstruct or impede the administration of justice in any court relating to a violation of or

conspiracy to violate § 18.2-248 or § 18.2-248.1 (a)(3), (b) or (c) he shall be guilty of a Class 5 felony.

Wash. Rev. Code Ann. §9A.76.020 (1977)

9A.76.020 Obstructing a public servant. Every person who, (1) without lawful excuse shall refuse or knowingly fail to make or furnish any statement, report, or information lawfully required of him by a public servant, or (2) in any such statement or report shall make any knowingly untrue statement to a public servant, or (3) shall knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties; shall be guilty of a misdemeanor.

W. Va. Code §61-5-17 (1984)

§ 61-5-17. Obstructing officer; penalty.

Any person who by threats, menaces, acts or otherwise, shall forcibly or illegally hinder, obstruct, or oppose, or attempt to obstruct or oppose, or shall counsel, advise or invite others to hinder, obstruct or oppose any officer in this State (whether civil or military) in the lawful exercise or discharge of his official duty, shall, for every such offense, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than five hundred dollars, and may, in the discretion of the court, be imprisoned not exceeding one year.

Wis. Stat. Ann. § 946.41 (West 1982)

946.41 Restricting or obstructing officer

(1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official

capacity and with lawful authority, is guilty of a Class A misdemeanor.

(2) In this section:

(a) "Officer means a peace officer or other public officer or public employe having the authority by virtue of his office or employment to take another into custody.

(b) "Obstructs" includes without limitation knowingly giving false information to the officer with intent to mislead him in the performance of his duty including the service of any summons or civil process.

(3) Whoever by violating this section hinders, delays or prevents an officer from properly serving or executing any summons or civil process, is civilly liable to the person injured for any actual loss caused thereby and to the officer or his superior for any damages adjudged against either of them by reason thereof.

Wyo. Stat. §6-5-204 (1977)

§ 6-5-204. Interference with peace officer; penalties.

(a) A person commits a misdemeanor punishable by imprisonment for not more than one (1) year, a fine of not more than one thousand dollars ($1,000.00), or both, if he knowingly obstructs, impedes or interferes with or resists arrest by a peace officer while engaged in the lawful performance of his official duties.

(b) A person who intentionally and knowingly causes or attempts to cause bodily injury to a peace officer engaged in the lawful performance of his official duties is guilty of a felony punishable by imprisonment for not more than ten (10) years.

APPENDIX B
ORDINANCE EXAMPLES NATIONWIDE[16]

Akron, Ohio Code of Ordinances § 136.11 (1985)

§ 136.11 Obstructing Official Business.

(a) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(b) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Albuquerque, N.M., Rev. Ordinances § 12-1-2-20 (1986)

§ 12-1-220 Resisting, Obstructing or Refusing to Obey an Officer.

Resisting, obstructing or refusing to obey an officer consists of either:

(a) Knowingly obstructing, resisting or opposing any officer of this state or any other duly authorized person serving or attempting to serve or execute any process or any rule or order of any of the courts of this state or any other judicial writ or process; or

(b) Resisting or abusing any judge, magistrate or peace officer in the lawful discharge of his duties; or

(c) Refusing to obey or comply with any lawful pro-

[16]Examples of ordinances quoted from NIMLO's code library and included in this Appendix have been checked with city officials of each city and reported to be currently in effect. Ordinances in NIMLO's code library included in Appendix C from the Texas Municipal League Code Library are omitted from Appendix B.

cess or order given by any police officer acting in the lawful discharge of his duties; or

(d) Interfering with, obstructing or opposing any officer in the lawful discharge of his regular and affixed duties.

Annapolis, Md., Code § 18-8, (1984)

§ 18-8 Resisting or interfering with police officer.

No person shall resist or interfere with any police officer in the discharge of his duty.

Boulder, Colo., Rev. Code § 5-5-3(a) (1981)

§ 5-5-3 Obstructing a Peace Officer or Firefighter.

(a) No person shall, by using or threatening to use violence, force, or physical interference or obstacle knowingly obstruct, impair, or hinder the enforcement of the law or the preservation of the peace by a peace officer, acting under color of official authority, or knowingly obstruct, impair, or hinder the prevention, control, or abatement of fire or other emergency action by a fire fighter, acting under color of official authority.

Chicago, Ill., Municipal Code § 11-33 (1982)

§ 11-33 Resisting Police Officer.

(a) Any person who knowingly shall resist or obstruct the performance by one known to the person to be a peace officer of any authorized act within his official capacity or shall knowingly interfere or prevent a peace officer from discharging his duty as such officer and whoever shall in any manner knowingly assist any person in the custody of any member of

the police department to escape or attempt to escape from such custody, shall be fined not less than $25.00 nor more than $500.00.

Columbia, S.C., Code of Ordinances §2-1003 (1980)

§ 2-1003 Resisting or interfering with police.

(a) It shall be unlawful for any person after having been placed under arrest or taken into custody by the police or other persons authorized to do so, to resist arrest whether actively or by flight.

(b) It shall be unlawful for any person to interfere with or molest a police officer in the lawful discharge of his duties.

Dayton, Ohio Code of Gen. Ordinances § 131.02 (1984)

§ 131.02 Obstructing Official Business.

(a) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties.

(b) Whoever violates this section is guilty of obstructing official business, a misdemeanor of the second degree.

Daytona Beach, Fla., Code § 35-7(a) (1971)

§ 35-7 Obstructing Firefighter and Police Officer and Official Police Dogs; Resisting Arrest or Physical Service of Process; Mistreatment of Dogs Prohibited.

(a) It shall be unlawful for any person knowingly to resist or obstruct the lawful performance by one who

the person knows, or has reason to believe, is a police officer, official police dog, or firefighter in any authorized act, within such officer's or dog's official capacity.

District of Columbia Code § 22-505 (1981)

§ 22-505. Assault on member of police force or fire department.

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, or any officer or member of any fire department operating in the District of Columbia; or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than 5 years or both. It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such arrest is made by an individual he has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

(b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than 10 years.

Fairbanks, Alaska Code of Ordinances § 6.602 (1984)

§ 6.602 Interfering with a Police Officer.

A person commits the offense of interfering with a police officer if:

(a) By use or threat of force or violence, he prevents or attempts to prevent a police officer from effecting an arrest of another person;

(b) By use or threat of force or violence he attempts to aid or aids a person in the custody of a police officer to escape; or

(c) With the intent to delay or prevent a police officer from discharging the officer's lawful duties, he in any manner physically impedes or hinders the police officer.

Jackson, Tenn., Charter and Official Code § 19-31 (1966)

§ 19-31 Resisting, interfering with Police Officer.

It shall be unlawful for any person to resist or in any way interfere with or hinder any police officer while the latter is in the discharge or apparent discharge of his duty.

Jackson, Wyo., Municipal Code § 9.04.050(a) (1973)

§ 9.04.050 Interference with Police Department.

(a) Resisting Officer. No person shall resist any police officer, any member of the police department, or any person duly empowered with police authority, while in the discharge or apparent discharge of his duty, or in any way interfere with or hinder him in the discharge of his duty, and upon conviction thereof,

such person shall be punished as provided in Section 1.12.010 of this code.

Kansas City, Mo., Code of Gen. Ordinances § 26.35(a) (1976)

§ 26.35 Obstructing and Resisting City Officer.

(a) Any person who shall in any way or manner hinder, obstruct, molest, resist or otherwise interfere with any city officer or inspector or any member of the police force in the discharge of his official duties shall be guilty of a misdemeanor.

Kilgore, Tex., Code § 19-17 (1960)

Sec. 19-17. Officers — Interfering with, imitating, resisting.

It shall be unlawful for any person to falsely represent himself to be an officer of the city, or, without being duly authorized by the city commission, to exercise or attempt to exercise any of the duties, functions or powers of a city officer or member of the police force, or to hinder, obstruct resist, or otherwise interfere with any city officer or member of the police force in the discharge of his official duties, or to attempt to prevent any such member of the police force or any officer of the city, from arresting any person, or to attempt to rescue from such officer or member of the police force any person in his custody, or to wear a badge similar to that worn by any official of the city, or any police officer of the city.

LaGrange, Ga., Code § 16-40 (1972)

§ 16-40 Peace Officers - Resisting, Obstructing, etc.

It shall be unlawful for any person to resist, obstruct, or oppose any policeman in making or attempting to make a legal arrest of any person or in serving or attempting to serve any legal process or order issued by the authorities of the city, county or state.

Lakewood, Colo., Municipal Code § 9.10.020 (1978)

§ 9.10.020 Interference with Policemen, Firemen, and Public Officials, in the Performance of their Duties.

(a) It is unlawful for any person to knowingly resist, interfere with, or impede or obstruct any policemen, firemen, city employee or other public official, who is attempting to discharge or in the course of discharging an official duty.

(b) It is unlawful for a person to threaten violence, reprisal or any other injurious act to any police officer, firemen, city employee or other public official who is engaged in the performance or attempted performance of his official duties or to make such a threat by reason or on account of the performing or attempted performance of his official duties.

Las Vegas, Nev., Municipal Code § 10.04.010 (1983)

§ 10.04.010 Interference with Peace Officer.

Any person who shall interfere with, resist, molest or threaten to molest any peace officer of the Las Vegas Metropolitan Police Department in the exercise of his official duties shall be guilty of a misdemeanor.

Mobile, Ala., City Code § 47-7 (1971)

§ 47-7 Resisting or Interfering with Officer; Assisting in Escape, etc.

If any person shall resist a police officer in the discharge of his duty or shall in any way interfere with or hinder or prevent him from discharging his duty as a police officer or offer or endeavor to do or assist any person in the custody of any policeman to escape or attempt to escape from such custody or rescue or attempt to rescue any person so in custody, he shall be punished as provided in section 1-4.

Memphis, Tenn., Code of Ordinances § 28-14 (1984)

§ 28-14 Offenses Against Police Officers.

It shall be unlawful for any person to assault or commit a battery upon any member of the police force, to resist the lawful arrest by any member of the police force, to escape from any lawful arrest by a member of the police force, to aid and abet in the escape from lawful arrest, or to obstruct or interfere in any manner with any officer while in the performance of his lawful duties.

Phoenix, Ariz., Charter and Code § 23.18 (1969)

§ 23.18 Police-Obstructing, Resisting or Opposing.

Any person who shall knowingly or willfully obstruct, resist or oppose any policeman or other officer of the City authorized to make arrests, in serving or attempting to serve any lawful process or order of the City Magistrate or of any court of the City, or in the performance of any official duty, or who shall assault or beat any such officer or person duly authorized,

when serving or executing, or attempting to serve or execute, or because of having served or executed, or attempted to serve or execute, any order or process of official duty, or when engaged in the performance of any official duty, shall be guilty of a misdemeanor.

Pittsburgh, Pa., Code § 601.14 (1979)

§ 601.14 Interference with Official Duties.

No person shall in any way interfere or cause or permit any interference with any City officer, employee or agent in their official duties.

St. Louis, Mo., Rev. Ordinances § 701.110 (1985)

§ 701.110 Interfering with Officer Unlawful.

It is unlawful for any person to interfere in any manner with a police officer or other employee of the County in the performance of his official duties or to obstruct him in any manner whatsoever while performing any duty.

Salt Lake City, Utah Rev. Ordinances § 32-1-5 (1975)

§ 32-1-5 Interfering with Officer in Discharge of Duty Prohibited.

Every person who knowingly and willfully challenges to fight, assaults, strikes, verbally abuses, interferes with, resists, molests or threatens any police officer or city fireman of Salt Lake City while in the discharge of his official duties is guilty of a misdemeanor.

Sioux Falls, S.D., Rev. Ordinances § 26-16 (1972)

§ 26-16 Unlawful to Delay, Obstruct or Resist Public Officer.

It shall be unlawful for any person to willfully delay, obstruct or resist any public officer in the discharge or attempt to discharge any duty of his office.

Tacoma, Wash., Charter and General Ordinances § 8.17.015 (1986)

§8.17.015 Obstructing a Public Servant.

(a) A person shall be guilty of a misdemeanor if he/she shall knowingly:

(1) File false criminal charges against another person or make any false statement to a police officer who is making an investigation in the discharge of his/her official duties, or

(2) Hinder, delay, or obstruct any public servant in the discharge of his/her official powers or duties.

(b) For the purposes of this section, a public servant is a city of Tacoma police officer, Fire Department official, Human Society officer, park patrol officer, warrant officer, bailiff, Pierce County Sheriff, or Washington State Patrol Officer.

Texarkana, Tex., Code § 15-5 (1961).

Sec. 15-5. City employees – Unauthorized direction of, interference with, etc.

Any person not an elected or appointed official of the city of Texarkana, Texas, who shall direct, control or interfere with, or attempt to direct, control or

interfere with, any city employee while in the performance of his duties or performing the duties of his job or position of the city shall be guilty of a misdemeanor.

The term "city employee," as used in this section, is defined to mean any employee of the city in any department, who receives compensation for his labor or services from the city and who is listed on the payroll of the city, as a full time or part time employee, and who works under and receives orders and directions from, through or under either an elected or appointed official of the city. The term "elected or appointed official" shall mean those officers of the city whose offices are created and defined by either the city charter or ordinances of the city.

Tulsa, Okla., Charter and Rev. Ordinances § 71 (1981)

§ 71 Resisting Officers.

It shall be an offense for any person to knowingly or willfully in any manner, or with the assistance of any instrument or device, obstruct, resist, oppose, or interfere with any officer or member of the Police Department of the City of Tulsa, any special policeman of the City of Tulsa, any person having police powers by authority of the City of Tulsa or any person called to the assistance of any member of said Police department, special policemen or other persons having such police powers while in the discharge of their respective duties.

Tuscaloosa, Ala., Municipal Code § 17-14 (1962)

§17-14 Police Officers — Resisting, Interfering with, etc.

It shall be unlawful for any person, by word, or act, to resist arrest or to interfere with, resist, molest, obstruct, hinder or impede any police officer in the discharge of his duty or to assault, attack, strike, intimidate, threaten or to use abusive or approbrious language toward any such police officer while in the discharge of his duty.

When a police officer of the city is engaged in the discharge of his duty as such and this then and there is, or would be, evident to a reasonably prudent person then present, and if such police officer is known to such person to be a police officer of the city or such police officer is in regular policemen's uniform or exhibits his badge or credentials as such police officer to any person, this shall of itself be prima facie notice to such person that the police officer is such and is then and there so acting.

Virginia Beach, Va., Code § 23-7 (1981)

§ 23-7 Resisting, Obstructing, etc., City Officers.

If any person, by threats or force, knowingly attempts to intimidate or impede a judge, magistrate, justice, juror, witness, or any law enforcement officer, lawfully engaged in his duties as such, or to obstruct or impede the administration of justice in any court, he shall be deemed to be guilty of a Class 1 misdemeanor.

Walnut Creek, Ca., Municipal Code § 3-5.304 (1978)

§ 3-5.304 Interference with Police and Authorized Officers.

It shall be unlawful for any person to interfere with or obstruct in any way any police officer or other officer or employee of the city in his enforcement of the provisions of this chapter. The removal, obliteration or concealment of any chalk mark or other distinguishing mark used by any police officer or other employee or officer of the city in connection with the enforcement of parking regulations of this chapter shall constitute such interference or obstruction. A violation of this section shall be a misdemeanor.

Waterloo, Iowa Code of Ordinances § 31-2 (1970)

§ 31-2 Interference with Peace Officers.

No person shall interfere with any peace officer in the discharge of his duties by preventing, or attempting to prevent, delay or hinder him in the discharge of his duties.

Wilmette, Ill., Village Code §12-8 (1977)

§ 12-8 Interfering with Village Officers.

It is unlawful for any person to interfere with, hinder or resist any officer or employee of the village while engaged in the duties of his office or employment.

APPENDIX C

Excerpts of Texas City Ordinances Furnished by Texas Municipal League[17]

Austin, Tex. Code § 9-1-2, p. 2197.

Sec. 9-1-2. Compliance with lawful orders of police officers; obstruction of police.

No person shall knowingly obstruct, prevent or interfere with any police officer who is engaged in the discharge of his or her official duty.

Blooming Grove, Tex. Code § 2C, p. 95.

C. Refusal To Aid An Officer.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

El Paso, Tex. Code § 10.04.040, p. 692.

Sec. 10-04.040. Hindering police officer.

No person shall, whether by words, sounds, or acts, hinder, obstruct or impede, or attempt to hinder, obstruct or impede, any police officer of the city in the performance of any official duty of such officer, other than the making of an arrest or the service of process.

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[17]The information in this Appendix has been provided by Susan Horton, General Counsel and Lori Gillespie, paralegal of the Texas Municipal League. The ordinances listed in Appendix C have been checked with a city official of each city and have been found to be currently in effect.

Frost, Tex. Code excerpt from Chap. 7 subsection C, p. 75.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner wih such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Galveston, Tex. Code §4-30, p. 398.

Sec. 14-30. Police – Interference.

It shall be unlawful for any person to obstruct, prevent or interfere with, or to attempt to obstruct, prevent or interfere with the chief of police or any other police officer in the lawful discharge of his duty within the city.

Hempstead, Tex. Code excerpt from § J, p. 153.

Executing Writs and Process and Powers of Office

It shall be the duty of the Chief of Police and each police officer to arrest, without warrant, all violators of the public peace and all who obstruct or interfere in the execution of the duties of their office.

Houston, Tex. Code § 34-11 (1968)

Sec. 34-11. Assaulating or interfering with policemen.

(a) It shall be unlawful for any person to assault, strike or in any manner oppose, molest, abuse or interrupt any policeman in the execution of his duty, or any person summoned to aid in making an arrest.

(b) It shall be unlawful for any person to wilfully or intentionally do any act, or utter any word in the hearing of another, encouraging, inciting or proposing or tending to encourage or incite the forcible or

unlawful rescue of any person in the custody of a policeman or officer of the city, or the prevention or hindrance of any lawful arrest, and any such offender shall be deemed guilty of riotous conduct.

Howe, Tex. Code excerpt from §4 page 126.

(4) The chief of police may arrest, without warrant . . . all who obstruct or interfere with him in the execution of the duties of this office. . . .

Ingleside, Tex. Code excerpt from §C p. 154.

C. Duties

It shall be his duty to arrest, without warrant . . . all who obstruct or interfere with him in the execution of the duties of his office or who shall be guilty of any disorderly conduct or disturbance whatsoever; . . .

Jacinto City, Tex. Code § 18C, p. 29.

C. Interference with; Unlawful

It shall be unlawful for any person to do any act, or utter any word, that would interfere, prevent or hinder in any lawful arrest while being made by a City Police Officer, Marshal, Assistant Marshal, or other peace officer. Any person who violates this Subsection shall be deemed guilty of riotous conduct and shall be fined in an amount not less than One ($1.00) Dollar and not more than Two Hundred ($200.00) Dollars.

Killeen, Tex. Code Chap. 7, Art. 4 §1, p. 445.

Section 1. Interfering with or obstructing officer.

Any person who may interfere with, obstruct,

hinder, prevent, or attempt to prevent the chief of police, policeman, or any other officer of the city council in the discharge of their duty or its duty by word, act, or deed, threats, intimidation or by the officer of any pecuniary or other consideration, or in any manner, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than five (5) nor more than one hundred dollars ($100.00).

Luling, Tex. Code §15-29, p. 441.

Sec. 15-29. Obstructing performance of officer's duties.

If any person shall in any manner interfere with, obstruct or in any other way hinder any officer in the discharge of his official duties shall be deemed guilty of a misdemeanor.

McAllen, Tex. Code §19-16, p. 667.

Sec. 19-16. Resisting police.

Any person who shall oppose or resist any police officer in discharge of his duties in this city shall be guilty of a misdemeanor.

Mission, Texas Code § 23-3, p. 1347-48.

Sec. 23-3. Interfering with, obstructing officers.

It shall be unlawful for any person, in any manner, to interfere with, prevent or otherwise obstruct any officer or employee of this city in the performance of his official duties.

Odessa, Texas Code § 15-8, p. 348.

Sec. 15-8. Interference or obstruction.

Every person who shall obstruct or interfere with any policeman while such policeman is engaged in the execution of his duties shall be guilty of a misdemeanor.

Quinlan, Tex. Code excerpt from § B, p. 105.

If any person at the scene of an arrest being made by a police officer or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Rice, Tex. Code excerpt from § C, p. 88.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

River Oaks, Tex. Code § 16-16, p. 708.

Sec. 16-16. Hindering or Interfering with duties of police.

The chief of police, policemen and other members of the police department, shall arrest all persons who shall obstruct or interfere with them in the execution of the duties of their offices, or who shall be guilty of any disorderly conduct whatever.

San Antonio; Tex. Code § 32-5, p. 808.2.

Sec. 32-5. Obstructing police.

It shall be unlawful for any person to obstruct, pre-

vent or interfere in any manner with the chief of police or any police officer, in the lawful discharge of his duty.

Seven Points, Tex. Code excerpt from § E, p. 64.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Strawn, Tex. Code excerpt from § C, p. 102.

If any person at the scene of an arrest being made by a police or any other peace officer shall interfere in any manner with such arrest, either by action or by words, he shall be guilty of a misdemeanor.

Watauga, Tex. Code § 11, p. 20.

The Chief of Police, Policemen and other membes of the Police Department, shall arrest all persons who shall obstruct or interfere with them in the execution of the duties of their offices, or who shall be guilty of any disorderly conduct whatsoever.